(16,750.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 212.

THIRD STREET AND SUBURBAN RAILWAY COMPANY APPELLANT,

vs.

MEYER LEWIS.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 9, 1898.

1 In the Circuit Court of the United States, Ninth Circuit, District of Washington, Northern Division.

MEYER LEWIS, Plaintiff,
vs.
WESTERN MILL COMPANY, a Body Corporate under the Laws of Washington; D. T. Denny, John Leary, John Keenen, R. R. Lombard, J. W. Edwards, James Frankland, Malcolm McDonald, James Oldfield, William Cochrane, David T. Denny, Manson F. Backus, Receiver of the Ranier Power & Railway Company, a Corporation Organized and Existing under the Laws of Washington; Union Trust Company of New York, a Corporation Organized and Existing under the Laws of the State of New York; The City of Seattle, a Municipal Corporation Organized and Existing under the Laws of the State of Washington; Charles H. Baker, Doing Business as Charles H. Baker & Company; A. P. Fuller; National Bank of Commerce of Providence, a Corporation Organized and Existing under the Act of Congress Known as the National Bank Act and the Acts Mandatory and Supplementary Thereto; Merchants' National Bank, a Corporation; Seattle Hardware Company, a Corporation; Commercial National Bank of Seattle, Nelson W. Parker, W. Hammond Wright; C. M. Sheafe, Receiver of the Washington Savings Bank; Third Street & Suburban Railway Company, a Corporation, and Thomas Boyd, Defendants. } No. 466.

2 *Præcipe for Transcript.*

To the clerk of the above court:

You will please prepare a record in the above-entitled cause to be transmitted to the United States circuit court of appeals at San Francisco, and include therein copies of the following from the files of said cause, to wit:

Supplemental bill, amended answer, demurrer to amended answer, order sustaining demurrer to amended answer, cost bill, decree, notice of appeal, assignment of error, citation with proof of service, supersedeas, waiver of joinder on appeal, cost of record, and by whom paid, and præcipe for transcript.

BAUSMAN, KELLEHER & EMORY,
Solicitors for Appellant Third Street & Suburban Railway Company.

3 In the Circuit Court of the United States, District of Washington, Northern Division.

MEYER LEWIS, Plaintiff,

vs.

WESTERN MILL COMPANY, a Body Corporate under the Laws of Washington; D. T. Denny, John Leary, John Keenen, R. R. Lombard, J. W. Edwards, James Frankland, Malcolm McDonald, James Oldfield, William Cochrane, Manson F. Backus, Receiver of the Ranier Power & Railway Company, a Corporation Duly Organized and Existing under and by Virtue of the Laws of the State of Washington; Union Trust Company of New York, a Corporation Organized and Existing under the Laws of the State of New York; City of Seattle, a Municipal Corporation Organized and Existing under the Laws of Washington; Charles H. Baker, Doing Business as Charles H. Baker & Company; A. P. Fuller; National Bank of Commerce of Providence, a Corporation Organized and Existing under the Act of Congress Known as the National Bank Act and the Acts Mandatory and Supplementary Thereto; Merchants' National Bank, a Corporation; Seattle Hardware Company, a Corporation; Commercial National Bank of Seattle, Nelson W. Parker, W. Hammond Wright; C. M. Sheafe, Receiver of the Washington Savings Bank; Third Street & Suburban Railway Company, a Corporation, and Thomas Boyd, Defendants.

4 *Supplemental Bill of Complaint.*

To the judges of the circuit court of the United States, district of Washington:

Meyer Lewis, a citizen of the city and county of San Francisco in the State of California, with leave of court first had and obtained brings this, his supplemental bill, against The Third Street & Suburban Railway Company, a corporation duly organized and existing under the laws of the State of Washington, defendant, with its principal place of business in the city of Seattle, in said State; the original bill herein being brought by this plaintiff against Western Mill Company, a corporation organized and existing under the laws of the State of Washington, with its principal place of business in Seattle, in said State, John Leary and J. W. Edwards, citizens of Washington and residents of Seattle, James Oldfield, citizen of Washington and a resident of Seattle, Malcolm McDonald, a citizen of Washington and a resident of Port Blakely, in said State, The City of Seattle, a municipal corporation duly organized and existing under the laws of the State of Washington, Washington Savings Bank, a corporation duly organized and existing under the laws of Washington, with its principal place of business in Seattle, in said State, and other defendants, against whom decrees *pro confesso* has been entered in the above-entitled cause prior to the bringing of this supplemental bill.

And your orator complains and says:

5 I.

That at all times hereinafter mentioned the defendant, Third Street & Suburban Railway Company, was and it now is a corporation, duly organized and existing under and by virtue of the laws of the State of Washington, with its principal place of business in the city of Seattle, in said State.

II.

That on the 14th day of May, 1884, at Seattle, in the then Territory (now State) of Washington, the defendant, The Western Mill Company, with the defendants, D. T. Denny, John Leary, John Keenen, R. R. Lombard, J. W. Edwards, James Frankland, Malcolm McDonald, and James Oldfield, as sureties, duly made and delivered to this plaintiff their promissory note, bearing date on that date, and substantially in the words and figures following, to wit:

"$20,000.00.

"SEATTLE, WASHINGTON TERRITORY, *May 14th*, 1884.

"Three years after date the Western Mill Company, a body corporate under the laws of Washington Territory, and D. T. Denny, John Keenen, John Leary, J. Oldfield, R. R. Lombard, Malcolm McDonald, James Frankland, and J. W. Edwards, for value received, jointly and severally promise to pay to the order of Meyer
6 Lewis, at San Francisco, California, the sum of twenty thousand dollars in United States gold coin, with interest at the rate of nine per cent. per annum from date until paid, the interest payable monthly at the Puget Sound national bank, at Seattle.

"In witness whereof, the said Western Mill Company, has caused this promissory note to be subscribed by its president and secretary and its corporate seal affixed, and the said promisors above named have subscribed their names and affixed their seals the day above written.

[CORPORATE SEAL.] "D. T. DENNY,
President of the Western Mill Company.
FRANK HANFORD,
Secretary of the Western Mill Company.
D. T. DENNY, [SEAL.]
JOHN LEARY, [SEAL.]
JOHN KEENEN, [SEAL.]
R. R. LOMBARD, [SEAL.]
J. W. EDWARDS, [SEAL.]
JAMES FRANKLAND, [SEAL.]
MALCOLM McDONALD, [SEAL.]
JAMES OLDFIELD, *Sureties.*" [SEAL.]

III.

That the said defendant, Western Mill Company, to secure the payment of the said principal sum and the interest thereon,
7 and attorney's fees, as mentioned in said note, according to the tenor thereof, did duly execute under its hand and seal

and deliver to the said plaintiff, a certain mortgage bearing date the 14th day of May, A. D. 1884, and conditioned for the payment of the said sum of twenty thousand dollars, and interest thereon at the rate of and at the time and in the manner specified in said note, and according to the conditions thereof, which said mortgage was duly acknowledged and certified so as to entitle the same to be recorded, and the same was afterwards, to wit, on the 15th of May, 1884, duly recorded in the auditor's office of King county, Territory (now State) of Washington, in volume II of Mortgages, page 710, records of King county, W. T., and which said mortgage conveyed and mortgaged to plaintiff all said premises and real estate in King county, Territory (now State) of Washington, described as follows: The west half of block numbered ninety-four (94), and lots numbered three (3), four (4), five (5), six (6), in block numbered one hundred and four (104) in D. T. Denny's First addition to North Seattle, and block A in D. T. Denny's Sixth *First* addition to North Seattle, together with all and singular the buildings and improvements thereon, and all the privileges and appurtenances thereunto belonging or in anywise appertaining.

IV.

That the interest on said principal sum mentioned in said promissory note and in said mortgage has been paid down to the 14th day of December, 1893, but nothing more has been paid thereon; and
8 the principal sum mentioned in said note and mortgage, together with interest thereon at the rate of nine per cent. per annum from the 14th day of December, 1893, has not been paid by said defendant nor any one else.

V.

That said defendant promised and agreed in said mortgage that if suit should be brought to foreclose the same, mortgagee, or his assigns, may tax and include in the sum decreed to be due thereon five per cent. of the sum so due as attorney's fees with costs; and one thousand and forty dollars is five per cent. of the sum so due on said mortgage, and is a reasonable attorney's fee to be decreed plaintiff herein for foreclosing said mortgage.

VI.

That plaintiff is now the lawful holder and owner of said note and mortgage.

VII.

That no action at law or in equity has ever been commenced upon said promissory note and mortgage except this action.

VIII.

That on or about the 14th day of October, 1891, the defendant, Western Mill Company, mortgagor herein, by its certain deed
9 of sale, sold said mortgaged premises and every part thereof to the Ranier Power and Railway Company, a corporation

organized under the laws of Washington, and having its principal place of business in Seattle; that thereafter, and on or about the 13th day of February, 1895, in the cause of A. P. Fuller *vs.* The Ranier Power & Railway Company, No. —, then pending before this honorable court, Eben Smith, Esq., the duly appointed, qualified and acting master in chancery in said cause, made executed and delivered to A. M. Brookes, Angus McIntosh and Frederick Bausman, purchasers of said premises, at a sale theretofore had, to satisfy a decree in said cause theretofore rendered by this court, a deed of sale to said mortgaged premises and each and every part thereof; that thereafter, on the 12th day of February, 1895, for a valuable consideration, said Angus McIntosh, A. M. Brookes and Frederick Bausman duly bargained and sold by their deed of sale, their right, title and interest in and to said premises, and every part thereof to The Third Street & Suburban Railway Company, defendant herein, who now claims some interest in or lien upon said mortgaged premises through said deed of purchase, so made subsequent to the commencement of plaintiff's action, but that said interest in or lien upon said property is subsequent, subject and inferior to the lien of plaintiff's mortgage.

Wherefore, plaintiff prays judgment against the said Western Mill Company, D. T. Denny, John Leary, John Keenen, R. R. Lombard, J. W. Edwards, James Frankland, Malcolm McDonald and James Oldfield, and each of them, defendants, for the sum of twenty thousand dollars, with interest at the rate of nine per cent. per annum, from said 14th day of December, 1893, and for the further sum of one thousand and forty dollars attorney's fees, and for his costs and disbursements herein.

That the usual decree be made herein for the sale of said mortgaged premises in accordance with the law and the rules of this court, and the proceeds of said sale be applied to the payment of the amount found to be due plaintiff on said note and mortgage.

That said defendant, The Third Street & Suburban Railway Company, a corporation, and all persons claiming through, by, or under it, either as purchasers, incumbrancers or otherwise, may be required to set up their claim or interest in said premises or any part thereof, and that they and each of them may be barred and foreclosed of all right, claim or equity of redemption in said premises, and each and every part thereof, and that plaintiff may have judgment against the said defendants who executed said note, as herein alleged, for any deficiency which may remain after applying all the proceeds of said sale of said premises properly applicable to the satisfaction of said judgment.

That this plaintiff may have such other and further relief against said defendant, The Third Street & Suburban Railway Company, and in the premises as to this court shall seem just and equitable.

CHAS. F. FISHBACK,
MORRIS B. SACHS,
Attorneys for Plaintiff.

11 UNITED STATES OF AMERICA, } ss:
State of Washington, County of King, }

Charles F. Fishback, being first duly sworn, on oath deposes and says: That he is one of the attorneys for plaintiff in the above-entitled action, and he makes this affidavit on behalf of plaintiff, because he is not now within the State of Washington; that he has heard the foregoing supplemental bill read, knows the contents thereof, and believes the same to be true; that this action is founded upon a written instrument for the payment of money, which instrument is in possession of this affiant.

CHAS. F. FISHBACK.

Subscribed and sworn to before me this 5th day of October, 1895.
[NOTARIAL SEAL.] ERNEST S. LYONS,
Notary Public in and for Washington, Residing at Seattle.

(Endorsed:) Copy of within supplemental bill rec'd this Oct. 8, 1895. Bausman, K. & E., att'ys for 3d St. & Sub. R'y Co. Supplemental bill. Filed Oct. 9, 1895. In the U. S. circuit court. A. Reeves Ayres, clerk, by E. A. Colvin, deputy.

12 UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Judicial Circuit, District of Washington. In Equity.

Subpœna ad Respondendum.

The President of the United States of America, Greeting, to the Third Street and Suburban Railway Company, a corporation; Malcolm McDonald, James Frankland, R. R. Lombard, and John Keenen:

You are hereby commanded, that you be and appear in said circuit court of the United States aforesaid, at the court-room in Seattle on the 5th day of August, A. D. 1895, to answer an amended bill of complaint exhibited against you and others in said amended bill named, filed in said court by Meyer Lewis, who is a citizen of the State of California, and to do and receive what the said court shall have considered in that behalf. And this you are not to omit under the penalty of five thousand dollars.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, this 3rd day of July in the year of our Lord one thousand eight hundred and ninety-five and of our Independence the 119th.

[SEAL.] A. REEVES AYRES, *Clerk*,
By R. M. HOPKINS,
Deputy Clerk.

13 *Memorandum Pursuant to Rule* 12, *Supreme Court U. S.*

You are hereby required to enter your appearance in the above suit, on or before the first Monday of August next, at the clerk's office

of said court, pursuant to said bill; otherwise the said bill will be taken *pro confesso*.

A. REEVES AYRES, *Clerk*,
By R. M. HOPKINS,
Deputy Clerk.

UNITED STATES MARSHAL'S OFFICE, *District of Washington*, } ss:

I hereby certify that I received the within writ on the 19th day of July, 1895, and personally served the same on the 20th day of July, 1895, by delivering to and leaving with John Keenen, said defendant named therein personally, at the city of Spokane, county of Spokane, in said district, an attached copy thereof.

JAMES C. DRAKE,
U. S. Marshal,
By SAM. VINSON, *Deputy*.

Spokane, Wash., July 20, '95.

Marshal's Fees.

To serving copy subpœna in equity.....	$4 00
To one mile travel.....	12
	$4 12

14 UNITED STATES MARSHAL'S OFFICE, *District of Washington*. }

I hereby certify that on the 3rd day of July, 1895, I served a true and correct copy of the foregoing and herein attached writ upon W. J. Grambs, sec'y of the Third Street & Suburban Railway Company, by delivering to, and leaving with, the said W. J. Grambs, at the city of Seattle, King county, State of Washington, a true and correct copy thereof. I further certify that on the 6th day of July, 1895, I personally served Malcolm McDonald, at Port Blakely, Kitsap Co., State of Washington, by delivering to, and leaving with, the said Malcolm McDonald a true and correct copy thereof.

JAMES C. DRAKE,
U. S. Marshal,
By G. W. CURTIS,
Deputy U. S. Marshal.

Dated at Seattle, July 22nd, 1895.

Marshal's fees, 12.68.

(Endorsed :) Alias subpœna. Filed July 22, 1895. In the U. S. circuit court. A. Reeves Ayres, clerk, by R. M. Hopkins, deputy.

15 In the Circuit Court of the United States, District of Washington, Northern Division.

MEYER LEWIS, Plaintiff,

vs.

WESTERN MILL COMPANY, a Body Corporate under the Laws of Washington; D. T. Denny, John Leary, John Keenen, R. R. Lombard, J. W. Edwards, James Frankland, Malcolm McDonald, James Oldfield, William Cochrane, Manson F. Backus, Receiver of the Ranier Power & Railway Company, a Corporation Duly Organized and Existing under and by Virtue of the Laws of the State of Washington; Union Trust Company of New York, a Corporation Organized and Existing under the Laws of the State of New York; City of Seattle, a Municipal Corporation Organized and Existing under the Laws of Washington; Charles H. Baker, Doing Business as Charles H. Baker & Company; A. P. Fuller; National Bank of Commerce of Providence, a Corporation Organized and Existing under the Act of Congress Known as the National Bank Act and the Acts Mandatory and Supplementary Thereto; Merchants' National Bank, a Corporation; Seattle Hardware Company, a Corporation; Commercial National Bank of Seattle, Nelson W. Parker, W. Hammond Wright, C. M. Sheafe, Third Street & Suburban Railway Company, a Corporation, Defendants.

16 *Amended Answer of Defendant Third Street and Suburban Railway Company.*

The answer of the defendant Third Street & Suburban Railway Company, amended by leave of court, to the supplemental bill of complaint of the above-named complainant.

In answer to the said supplemental bill, the Third Street and Suburban Railway Company says as follows:

I.

Each and all the premises described in the supplemental bill of complaint were owned in fee by the defendant, Western Mill Company, up to the month of April, 1891. In that month the mill company, for a valuable consideration, bargained, sold and conveyed each and all these premises to a corporation organized and existing under the laws of the State of Washington, called the Ranier Power & Railway Company, and that company did immediately thereafter apply the purchased premises to railway uses by devoting them, along with other purposes, to the manufacture of material for the construction of its railway, and erected thereon and till its receivership operated thereon a power-house for its railway. The assets of the Ranier Power & Railway Company did, on the 13th day of June, 1893, pass into the hands of a receiver, defendant Manson F. Backus, in a suit brought in the circuit
17 court of the United States for the district of Washington, in which A. P. Fuller was complainant and The Ranier Power

and Railway Company defendant. That court then had and still has exclusive jurisdiction of the properties of the Ranier Power & Railway Company, and of the cause of Fuller against the Ranier Power & Railway Company, except as it may have been divested of the properties by the receiver's sale hereinafter described, and the cause of Fuller against the railway company is yet undismissed and undetermined. Manson F. Backus, as receiver, did, under order of the court, continue to operate all the properties and the power-house aforesaid of the Ranier Power & Railway Company from the time of his appointment, including the premises described in the supplemental complaint, and did on the 8th day of August, 1894, under due order of the United States court aforesaid, create, issue, and sell for cash receiver's certificates upon all the properties of the Ranier Power & Railway Company in his possession, including the lands specified in the supplemental bill of complaint. These certificates were by the order of the court creating them adjudged to be necessary and essential to the continued existence of the railway company as a corporation of that character, and were made upon petition of the receiver, showing that the operating expenses of the company exceeded its gross receipts, and that unless money were raised by means of these certificates the property would have to be abandoned, and the order of court creating these certificates did establish them as a first lien upon all the property in the receiver's hands, including the lands described in the supplemental bill of complaint.

18 Subsequently the holders of these certificates did petition the court in which they were issued to enforce the lien, and the whole thereof, with interest, no part of the same having been paid, and it was thereupon ordered by the court that all the properties in the possession of the receiver, including those specified in the supplemental bill of complaint, should be exposed to public sale by the receiver. Such sale occurred on the 28th day of January, 1895, to Angus Mackintosh, A. M. Brookes, and Frederick Bausman. This sale was on February 11th, 1895, confirmed. The said Mackintosh, Brookes, and Bausman did on the 12th day of February, 1895, bargain, sell and convey all the aforesaid properties, including the lands specified in the supplemental bill of complaint, unto this defendant, The Third Street & Suburban Railway Company.

II.

This defendant further says that the Ranier Power & Railway Company was, at the time of the conveyance of the mortgaged lands to it by the mill company, a corporation organized with railway powers, and then owned and continued to acquire public franchises for railway purposes, and to operate a railway during the period hereinafter mentioned. Complainant, however, did not then seek to foreclose his mortgage or to collect the debt secured by it, but forebore to do so during more than two years following. During this period the principal of the debt was long overdue, but complainant accepted interest on the loan from the Ranier Power & Railway Company, and even after the passing of that company's

assets into the hands of the receiver Backus he accepted in-
19 terest from him as such receiver to apply on this mortgage debt, and the whole of said interest was paid up to the 24th day of December, 1893.

III.

The Ranier Power & Railway Company did between the date of its receiving conveyance of the mortgaged lands to the date of the receivership pay taxes upon the mortgaged lands for the years 1891 and 1892 and the insurance thereon. These exceeded the sum of five thousand dollars, and the greater part was expended in an insolvent condition. Receiver Backus, before the complainant's foreclosure was begun, also paid taxes and insurance upon them to the amount of three thousand dollars. During the entire period of its receivership the Ranier Power & Railway Company was utterly insolvent.

IV.

Complainant Meyer Lewis was not a party to the suit in which the receiver's certificates hereinbefore mentioned were issued, but did at all times have notice of the existence of that action and of the receivership, and accepted the payment of interest from the receiver as hereinbefore mentioned with knowledge of the litigation and of all the facts and circumstances hereinbefore recited, and during the space of eleven months forebore to bring action on his mortgage, and during that period suffered the receiver with the trust funds to protect the mortgaged property. About three
20 months before the issuance of the receiver's certificates complainant caused his appearance to be entered in said cause for the purpose of obtaining leave to sue the receiver, but did not ask that he be made a party to the cause or serve notice of his appearance upon any of the parties to it. The sale under the receiver's certificates was known to complainant both before and after its date, but complainant has never sought to disturb it or filed objection thereto.

Wherefore, this defendant prays that it go hence with its costs and disbursements herein, and that the title of this defendant to the premises sought to be foreclosed on by plaintiff be adjudged superior to that of plaintiff's alleged lien, and that as to this defendant and as to all persons claiming under this defendant said lands be adjudged wholly free and discharged thereof.

2nd. That in the event that the lands in controversy be not declared by the court wholly free and discharged of plaintiff's alleged lien, that the court nevertheless deduct from and charge against plaintiff's claim all sums expended by the Ranier Power & Railway Company since its acquisition of those lands from the Western Mill Company and during its insolvency, and also all sums expended thereupon by the receiver of the Ranier Power & Railway Company, and all interest by complainant accepted from that receiver.

3rd. That this defendant have such other and further and general relief as to the court may seem just.

BAUSMAN, KELLEHER & EMORY,
Solicitors for Defendant and of Counsel.

21 (Endorsed:) Amended answer of Third St. & Suburban Railway Company. Filed Nov. 23, 1895. In the U. S. circuit court. A. Reeves Ayres, clerk, by R. M. Hopkins, deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

MEYER LEWIS, Plaintiff,
vs.
THE WESTERN MILL COMPANY, 3RD STREET AND SUBURBAN RAILWAY COMPANY, a Corporation, *et al.*, Defendants. } No. 466.

Demurrer of Plaintiff to Amended Answer of Defendant Third Street and Suburban Railway Company.

This plaintiff, Meyer Lewis, by protestation, not confessing or acknowledging all or any of the matters and things in said amended answer of said defendant, 3rd Street & Suburban Railway Company, mentioned to be true in such manner and form as the same are therein set forth and alleged, doth demur to said amended answer, and for causes of demurrer showeth:

That it appeareth by said defendant's own showing in para-
22 graphs 1, 2, 3, and 4 of the alleged defense set forth in said amended answer that the said defendant is not entitled to the relief prayed for in said answer against this plaintiff.

That said alleged defense set forth in said amended answer of said defendant states no fact sufficient to constitute a cause of defense to the supplemental bill complaint of this plaintiff.

Wherefore, and for divers other good causes of demurrer appearing in the said amended answer of said defendant, this plaintiff doth demur thereto. And he prays the judgment of this honorable court whether he shall be compelled to make reply to said answer.

MORRIS B. SACHS AND
CHARLES F. FISHBACK,
Solicitors and Counsel for Plaintiff.

(Endorsed:) Due service hereof admitted and a true copy of the enclosed received this 23 day of November, 1895. Bausman, Kelleher & Emory. Plaintiff's demurrer to amended answer, etc. Filed Nov. 25, 1895. In the U. S. circuit court. A. Reeves Ayres, clerk, by R. M. Hopkins, deputy.

23 MEYER LEWIS
vs.
WESTERN MILL CO. ET AL. } 466.

Order Sustaining Demurrer.

Now, on this day this cause coming on to be heard upon plaintiff's demurrer to the amended answer of Third Street & Suburban R'y Co., the court, after hearing argument of respective counsel, and being sufficiently advised in the premises, sustains said demurrer.

Dec. 5, 1895.

General Order Book, vol. 3, page 510.

24 In the Circuit Court of the United States for the District of Washington, Northern Division.

MEYER LEWIS, Plaintiff,
vs.
WESTERN MILL COMPANY, a Body Corporate under the Laws of Washington; D. T. Denny, John Leary, John Keenen, R. R. Lombard, J. W. Edwards, James Frankland, Malcolm McDonald, James Oldfield, William Cochrane, David T. Denny; Manson F. Backus, Receiver of the Ranier Power & Railway Company, a Corporation Organized and Existing under the Laws of Washington; Union Trust Company of New York, a Corporation Organized and Existing under the Laws of the State of New York; The City of Seattle, a Municipal Corporation Organized and Existing under the Laws of the State of Washington; Charles H. Baker, Doing Business as Charles H. Baker & Company; A. P. Fuller, National Bank of Commerce of Providence, a Corporation Organized and Existing under the Act of Congress Known as the National Bank Act and the Acts -mandatory and Supplementary Thereto; Merchants' National Bank, a Corporation; Seattle Hardware Company, a Corporation; Commercial National Bank of Seattle, Nelson W. Parker, W. Hammond Wright; C. M. Sheafe, Receiver of the Washington Savings Bank; Third Street & Suburban Railway Company, a Corporation, and Thomas Boyd, Defendants. } No. 466.

25 *Decree.*

This cause coming on duly and regularly for hearing upon plaintiff's motion for a decree herein based upon the findings of fact and conclusions of law heretofore found by the court—

Plaintiff appearing by his attorneys, Charles F. Fishback and Ernest S. Lyons of counsel; defendant City of Seattle appearing by its attorney, W. T. Scott; the defendants John Leary and J. W. Ed-

wards appearing by Messrs. Hardin & Ferry, their attorneys; defendants Malcolm McDonald and James Oldfield appearing by their attorney, D. T. Cross; defendant Washington Savings Bank and C. M. Sheafe, its receiver, appearing by their attorneys, Messrs. Clise & King—and it appearing to the court that a demurrer has been heretofore sustained to the amended answer of the defendant, Third Street & Suburban Railway Company, by order of this court, to which ruling of the court said defendant excepts, and which exception is allowed by this court, and that said defendant, through its attorneys, Messrs. Bausman, Kelleher & Emory, gave notice in open court that said defendant, Third Street & Suburban Railway Company, refused to amend its said answer, or to plead further in said cause, but elected to stand on said answer, and it appearing to the court that the defendants, Charles H. Baker, doing business as Charles H. Baker & Company, William Cochrane, Ranier Power & Railway

26 Company, a corporation, National Bank of Commerce of Providence, Rhode Island, Union Trust Company of New York, a corporation, and the Commercial National Bank of Seattle, and each of them, has appeared by their attorneys, and filed their appearances in this cause and subsequent thereto, an order was entered in this case taking plaintiff's bill of complaint *pro confesso*, as to each of said defendants, and it further appearing to the court that the defendants John Keenen, N. W. Parker, A. P. Fuller, R. R. Lombard, James Frankland, The Western Mill Company, a corporation, D. T. Denny, Merchants' National Bank of Seattle, a corporation, Seattle Hardware Company, a corporation, W. Hammond Wright, Thomas Boyd and David T. Denny, and each of them have been duly and regularly served with the process and the complaint herein, and they, and each of them, have failed to move, demur, answer, or otherwise appear within the time allowed by law, or at all, and an order has been heretofore entered herein, taking plaintiff's bill of complaint herein *pro confesso*, as to each of said defendants, and the court, having heard and considered the evidence and proofs introduced on behalf of plaintiff and the defendants, James Oldfield, Malcolm McDonald, John Leary, J. W. Edwards, City of Seattle, and the Washington Savings Bank, and being fully advised in the premises, grants said motion:

Wherefore, it is ordered, considered, adjudged, and decreed by the court, that the plaintiff, Meyer Lewis, do have and recover of and from the defendants, Western Mill Company, a corporation, D. T. Denny, John Keenen, R. R. Lombard, James Frankland, Malcolm McDonald, John Leary, J. W. Edwards, and James Oldfield, and from each of them, the sum of twenty thousand ($20,000)

27 dollars, with interest thereon at the rate of nine per cent. per annum from the 14th day of December, A. D. 1893, to the date hereof, amounting to twenty-four thousand one hundred and thirty dollars ($24,130), together with an attorneys' fee of ten hundred and forty ($1,040) dollars, which is a reasonable attorneys' fee to be allowed plaintiff herein, and the costs of this action to be taxed, with interest on the whole of said sums at the rate of nine per cent. per annum from the date hereof until paid.

That said sums, and each of them, are a lien, which is prior to the claim or lien of any of the defendants herein upon the west one-half (W. ½) of block numbered ninety-four (94), except a strip eleven and thirty-six-hundredths (11.36) feet wide on the north side of lot fourteen (14) of said block ninety-four (94), and upon the lots numbered three (3), four (4), five (5), and six (6) in block numbered one hundred and four (104) in D. T. Denny's First addition to North Seattle and block "A" in D. T. Denny's Sixth addition to North Seattle, and on each and every part thereof, together with all and singular the buildings and improvements thereunto belonging, or in anywise appertaining, all of which property is lying and being in King county, Washington.

That said lien be, and the same is, hereby foreclosed.

That the court hereby directs Hon. Eben Smith, master in chancery, to sell said mortgaged premises, and to cause the same to be advertised for sale, once a week, in the "Daily Post-Intelligencer," a paper of general circulation in the city of Seattle, county of King, and State of Washington, and also to cause notices thereof to be posted in three public places in said city of Seattle, county
28 and State aforesaid, before any sale of said property shall take place; said notices to specify the time and place of sale, which shall be held by said master in chancery on said mortgaged premises, at the corner of Bismark and Mercer streets, in the city of Seattle, in the county and State aforesaid, on the date and hour fixed in said notices, after the same has been duly given as herein specified, and the proceeds of such sale be applied to the payment of the costs of such sale and the costs and disbursements of this action, and the several sums due plaintiff on his said note and mortgage, including said attorneys' fee, and by such sale to forever bar and foreclose said defendants, and each and every one of them, and any and all persons claiming by, through or under them, or any of them, from any and all claim, right, title, and interest in and to said premises, and each and every part thereof, save and except the right and claim of the city of Seattle to a strip eleven and thirty-six-hundredths (11.36) wide on the north side of lot fourteen (14) of said block ninety-four (94) of D. T. Denny's First addition to North Seattle, King county, Washington, except the right of redemption allowed by statute.

That plaintiff may become a purchaser at said sale, and upon such sale said master in chancery shall make a deed to said premises to the purchaser thereof, and said purchaser may be let into immediate possession of said described premises, and each and every part thereof.

That if any deficiency remains after the application of the proceeds of said sale to the payment of the several sums hereinbefore mentioned as herein designated, that plaintiff, Meyer Lewis,
29 have judgment and execution against the property of the defendants, Western Mill Company, D. T. Denny, John Keenen, R. R. Lombard, James Frankland, Malcolm McDonald, John Leary, J. W. Edwards, and James Oldfield, and each of them, for the amount of such deficiency.

That the defendants, Malcolm McDonald, John Leary, J. W. Edwards and James Oldfield, be, and they hereby are, decreed to be sureties for the defendant, Western Mill Company, on the note sued upon in this action.

That the claim or lien of the Washington savings bank and of C. M. Sheafe in and to the property on which plaintiff is seeking to foreclose his said mortgage in this action is, and the same hereby is decreed to be subject, subsequent, and inferior to the lien and claim of plaintiff's said mortgage.

That any surplus remaining after the judgment rendered herein, in favor of the plaintiff, including interest, costs, and attorneys' fees, has been paid and satisfied shall be paid to said C. M. Sheafe, receiver of the Washington savings bank, until the amount of his said liens have been fully paid and satisfied.

If any surplus remain after the application of the proceeds derived from the sale of said premises as herein designated, that the same be paid into the registry of this court for the use and benefit of the defendants herein, as their interest may appear.

That the defendant, City of Seattle, be and the same is hereby decreed to be the owner and entitled to the possession of a strip of land eleven and thirty-six-hundredths (11.36) feet wide on the north side of lot fourteen (14) in block ninety-four, in D. T. Denny's First addition to North Seattle, King county, Washington, free from incumbrance or lien of plaintiff's mortgage, or of lien or claim of said defendants, or any of them, or of any and all persons claiming through, by, or under said defendants, or either of them.

Done in open court this 31st day of March, A. D. 1896.

C. H. HANFORD, *Judge.*

To the entry of this decree defendant, Third Street & Suburban Railway Company excepts, which exception is allowed by the court.

O K.

CLISE & KING,
Attorneys for Sheafe, Receiver.

O K.

J. K. BROWN,
Corporation Counsel.

O K.

BAUSMAN, KELLEHER & EMORY.

O K.

DANIEL T. CROSS.
Att'y for James Oldfield and Malcolm McDonald.

(Endorsed:) Decree. Filed M'ch 31, 1896. In the U. S. circuit court. A. Reeves Ayres, clerk, by R. M. Hopkins, deputy.

31 In the Circuit Court of the United States, District of Washington, Northern Division.

MEYER LEWIS, Plaintiff,
vs.
WESTERN MILL CO. ET AL., Defendants. } No. 466.

Notice of Taxation of Costs.

Notice to defendant Third Street & Suburban Railway Company and to Messrs. Bausman, Kelleher & Emory, solicitors for said defendant; to defendants John Leary and J. W. Edwards, and to Messrs. Hardin & Ferry, their solicitors, and to defendants Malcolm McDonald and James Oldfield, and to their solicitor, D. T. Cross:

You and each of you will please take notice that the plaintiff in the above-entitled action will, on Saturday, the 4th day of April, A. D. 1896, at the hour of 10 a. m., or as soon thereafter as counsel can be heard, move the clerk of the above-entitled court to tax his costs and expenses herein in accordance with the plaintiff's bill of costs hereto annexed and the records of said court in this cause.

MORRIS B. SACHS AND
CHARLES F. FISHBACK,
Solicitors for Plaintiff.

32 In the Circuit Court of the United States for the District of Washington, Northern Division.

MEYER LEWIS, Plaintiff,
vs.
WESTERN MILL CO. ET AL., Defendants. } No. 466.

Memorandum of Costs.

Western Mill Co. *et al.* to Meyer Lewis, Dr.

To fees of printer for publishing summons herein		$15 60
To fees, clerk of superior court:		
Filing complaint.....	$4 00	
Transcript of record	2 25	
Sheriff's fees, superior court, for serving process herein	11 40	
		17 65
Total		$33 25

UNITED STATES OF AMERICA,
State of Washington, County of King, } *ss:*

Ernest S. Lyons, being first duly sworn, upon his oath deposes and says: that he is one of the attorneys for plaintiff herein;
33 that as such he is familiar with plaintiff's costs and expenses in this action, and that the above statement is true and cor-

rect, and each item thereof was necessarily incurred by plaintiff in the prosecution of the above action.

ERNEST S. LYONS.

Subscribed and sworn to before me this the 1st day of April, 1896.

[NOTARIAL SEAL.] FRED H. PETERSON,
Notary Public in and for the State of Washington, Residing at Seattle.

(Endorsed:) Due service hereof admitted and a true copy of the enclosed received this 1st day of April, A. D. 1896. Bausman, Kelleher & Emory, solicitors for 3rd Street & Suburban Railway Company. Hardin & Ferry, solicitors for Leary & Edwards. Daniel T. Cross, solicitor for Oldfield & McDonald. Notice. Cost bill. Filed Apr. 3, 1896. In the U. S. circuit court. A. Reeves Ayres, clerk, by R. M. Hopkins, deputy.

34 In the Circuit Court of the United States for the District of Washington, Northern Division.

MEYER LEWIS, Plaintiff,
vs.
WESTERN MILL COMPANY, a Body Corporate under the Laws of Washington; D. T. Denny, John Leary, John Keenen, R. R. Lombard, J. W. Edwards, James Frankland, Malcolm McDonald, James Oldfield, William Cochrane, David T. Denny; Manson F. Backus, Receiver of the Ranier Power & Railway Company, a Corporation Organized and Existing under the Laws of Washington; Union Trust Company of New York, a Corporation Organized and Existing under the Laws of the State of New York; The City of Seattle, a Municipal Corporation Organized and Existing under the Laws of the State of Washington; Charles H. Baker, Doing Business as Charles H. Baker & Company; A. P. Fuller; National Bank of Commerce of Providence, a Corporation Organized and Existing under the Act of Congress Known as the National Bank Act and the Acts Mandatory and Supplementary Thereto; Merchants' National Bank, a Corporation; Seattle Hardware Company, a Corporation; Commercial National Bank of Seattle, Nelson W. Parker, W. Hammond Wright; C. M. Sheafe, Receiver of the Washington Savings Bank; Third Street & Suburban Railway Company, a Corporation, and Thomas Boyd, Defendants.

35 *Petition for Appeal.*

The above-named defendant, Third Street & Suburban Railway Company, conceiving itself aggrieved by the decree entered on the 31st day of March, 1896, in the above-entitled cause, does hereby appeal from said decree to the United States circuit court of appeals for the ninth circuit, and prays that this, its appeal, may be allowed, and that

a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States circuit court of appeals for the ninth circuit.

BAUSMAN, KELLEHER & EMORY,
Solicitors for the Defendant Third Street & Suburban Railway Company.

Dated April 8, 1896.

And now, to wit, on the 8th day of April, 1896, it is ordered that an appeal be allowed as prayed for.

C. H. HANFORD, *Judge.*

(Endorsed:) Appeal. Filed Apr. 14, 1896. In the U. S. circuit court. A. Reeves Ayres, clerk, by R. M. Hopkins, deputy.

36 In the Circuit Court of the United States for the District of Washington, Northern Division.

MEYER LEWIS, Plaintiff,
vs.
WESTERN MILL COMPANY, a Body Corporate under the Laws of Washington; D. T. Denny, John Leary, John Keenen, R. R. Lombard, J. W. Edwards, James Frankland, Malcolm McDonald, James Oldfield, William Cochrane, David T. Denny, Manson F. Backus, Receiver of the Ranier Power & Railway Company, a Corporation Organized and Existing under the Laws of Washington; Union Trust Company of New York, a Corporation Organized and Existing under the Laws of the State of New York; The City of Seattle, a Municipal Corporation Organized and Existing under the Laws of the State of Washington; Charles H. Baker, Doing Business as Charles H. Baker & Company; A. P. Fuller; National Bank of Commerce of Providence, a Corporation Organized and Existing under the Act of Congress Known as the National Bank Act and the Acts Mandatory and Supplementary Thereto; Merchants' National Bank, a Corporation; Seattle Hardware Company, a Corporation; Commercial National Bank of Seattle, Nelson W. Parker, W. Hammond Wright; C. M. Sheafe, Receiver of the Washington Savings Bank; Third Street & Suburban Railway Company, a Corporation, and Thomas Boyd, Defendants. } No. 400.

37 *Assignment of Errors.*

Comes now the above-named defendant, Third Street & Suburban Railway Company, and says, that in the records and proceedings

in the above-entitled cause, and in the judgment rendered therein upon the 31st day of March, 1896, there is manifest error in this, to wit:

1st. In sustaining the demurrer of plaintiff to the amended answer of this defendant to the supplementary bill of plaintiff.

2nd. In entering a decree against this defendant in favor of plaintiff.

Wherefore, Third Street & Suburban Railway Company, defendant, prays that this, its assignment of errors, be entered upon the record of this cause, and it further prays that upon the hearing of this appeal it be adjudged by the United States circuit court of appeals for the ninth circuit, if the said court shall entertain jurisdiction hereof upon its merits, that the said decree be in all things reversed, and that this defendant be granted the relief prayed for in its amended answer.

Dated April 8th, 1896.

THIRD STREET & SUBURBAN RAILWAY COMPANY,
By BAUSMAN, KELLEHER & EMORY,
Its Solicitors.

(Endorsed:) Assignment of errors. Filed Apr. 14, 1896. In the U. S. circuit court. A. Reeves Ayres, clerk, by R. M. Hopkins, deputy.

38 In the Circuit Court of the United States for the District of Washington, Northern Division.

MEYER LEWIS, Plaintiff,
vs.
WESTERN MILL COMPANY, a Body Corporate under the Laws of Washington; D. T. Denney, John Leary, John Keenen, R. R. Lombard, J. W. Edwards, James Frankland, Malcolm McDonald, James Oldfield, William Cochrane, David T. Denny, Manson F. Backus, Receiver of the Ranier Power & Railway Company, a Corporation Organized and Existing under the Laws of Washington; Union Trust Company of New York, a Corporation Organized and Existing under the Laws of the State of New York; The City of Seattle, a Municipal Corporation Organized and Existing under the Laws of the State of Washington; Charles H. Baker, Doing Business as Charles H. Baker & Company; A. P. Fuller; National Bank of Commerce of Providence, a Corporation Organized and Existing under the Act of Congress Known as the National Bank Act and the Acts Mandatory and Supplementary Thereto; Merchants' National Bank, a Corporation; Seattle Hardware Company, a Corporation; Commercial National Bank of Seattle, Nelson W. Parker, W. Hammond Wright; C. M. Sheafe, Receiver of the Washington Savings Bank; Third Street & Suburban Railway Company, a Corporation, and Thomas Boyd, Defendants. } No. 400.

39 *Supersedeas Bond.*

Know all men by these presents: That we, The Third Street & Suburban Railway Company as principal, and A. M. Brookes, of the county of King and State of Washington, as surety for the above-named Third Street & Suburban Railway Company are jointly and severally held and firmly bound unto Meyer Lewis, the above-named plaintiff, in the penal sum of two thousand dollars ($2,000.00) to him to be paid, the said Meyer Lewis, for the payment of which jointly and severally we bind ourselves by these presents.

Witness our hands this 7th day of April, 1896.

The condition of this obligation is such that, whereas the above-named Third Street & Suburban Railway Company has prosecuted an appeal to the United States circuit court of appeals for the ninth circuit in the above-entitled cause:

Therefore, if the said Third Street & Suburban Railway Company, appellant, shall prosecute its said appeal to effect and answer all damages and costs, if it shall fail so to do, then this obligation shall be void; otherwise, to remain in full force and virtue.

THIRD STREET AND SUBURBAN RAILWAY COMPANY,
[CORPORATE SEAL.] By W. J. GRAMBS, *Sec'y.*
A. M. BROOKES.

Approved this 8th day of April, 1896.
[SEAL.] C. H. HANFORD,
District Judge.

40 DISTRICT OF WASHINGTON, } ss:
State of Washington, County of King, }

Personally appear*ing* before me, the undersigned, a notary public in and for the State of Washington, A. M. Brookes, to me personally known to be the surety named in the above bond, who, being first duly sworn, deposes and states that he is a resident and freeholder within this district and worth the sum of two thousand dollars ($2,000.00) over and above all debts and liabilities, and exclusive of property exempt from execution.

Witness my hand and official seal this 7th day of April, 1896.
[NOTARIAL SEAL.] DANIEL KELLEHER,
Notary Public in and for the State of Washington,
Residing at Seattle.

(Endorsed:) Supersedeas bond. Filed Apr. 14, 1896. In the U. S. circuit court. A. Reeves Ayres, clerk, by R. M. Hopkins, deputy.

41 In the Circuit Court of the United States for the District of Washington, Northern Division.

MEYER LEWIS, Plaintiff,
vs.
WESTERN MILL CO. ET AL., Defendants. } No. 466.

Exceptions to Bond on Appeal.

Comes now plaintiff and hereby excepts to the sufficiency of the bond given by the defendant, Third Street & Suburban Railway Company, upon appeal herein, on the following grounds, to wit:

1. That said bond is conditioned in a sum less than double the amount involved herein.

2. That said bond is conditioned in a sum insufficient to cover damages and costs to plaintiff pending an appeal herein.

3. That said bond is improperly executed, and has but one surety.

4. That said bond was signed and filed without the knowledge of plaintiff or either of his solicitors herein.

5. That no notice of the time and place of the examination
42 of the sureties, or of any surety proposed, was given to plaintiff, or either of his solicitors, as is required by law and the rules of this court.

6. That said bond was presented to this court for approval without the knowledge of plaintiff, or either of his counsel herein.

7. That said bond is irregular upon its face and insufficient, and does not comply with the law and the practice of this court governing the giving of bonds on appeal in such case made and provided,

and plaintiff moves the court for an order setting aside the order approving said alleged bond heretofore made herein, and to require said defendant to furnish a good and sufficient bond in double the amount involved, with two sureties thereon to be approved by this court.

MORRIS B. SACHS AND
CHARLES F. FISHBACK,
Solicitors for Plaintiff.

(Endorsed:) Exceptions to appeal bond. Due service hereof admitted and a true copy of the enclosed received this 18th day of April, 1896. Bausman, Kelleher & Emory, attorneys for d'f't 3rd St. & Sub. R'y Co. Filed Apr. 18, 1896. In the U. S. circuit court. A. Reeves Ayres, clerk, by R. M. Hopkins, deputy.

43 nI the Circuit Court of the United States for the District of Washington, Northern Division.

MEYER LEWIS, Plaintiff,
vs.
WESTERN MILL COMPANY, a Body Corporate under the Laws of Washington; D. T. Denny, John Leary, John Keenen, R. R. Lombard, J. W. Edwards, James Frankland, Malcolm McDonald, James Oldfield, William Cochrane, David T. Denny, Manson F. Backus, Receiver of the Ranier Power & Railway Company, a Corporation Organized and Existing under the Laws of Washington; Union Trust Company of New York, a Corporation Organized and Existing under the Laws of the State of New York; The City of Seattle, a Municipal Corporation Organized and Existing under the Laws of the State of Washington; Charles H. Baker, Doing Business as Charles H. Baker & Company; A. P. Fuller; National Bank of Commerce of Providence, a Corporation Organized and Existing under the Act of Congress Known as the National Bank Act and the Acts Mandatory and Supplementary Thereto; Merchants' National Bank, a Corporation; Seattle Hardware Company, a Corporation; Commercial National Bank of Seattle, Nelson W. Parker, W. Hammond Wright; C. M. Sheafe, Receiver of the Washington Savings Bank; Third Street & Suburban Railway Company, a Corporation, and Thomas Boyd, Defendants. } No. 466.

44 *Consent to Appeal without Joinder.*

STATE AND DISTRICT OF WASHINGTON, } ss:
County of King, }

We, the undersigned, solicitors of record in the above-entitled cause for the defendants respectively named below, do con-

sent that defendants, Third Street & Suburban Railway Company, appeal to the circuit court of appeals of the United States, for the ninth circuit, from the decree rendered in this cause on the 31st day of March, 1896, without joinder of each or all of us in said appeal, and we do waive further notice thereof, and authorize the judge or court to allow an appeal to be taken separately by the Third Street & Suburban Railway Company.

Dated April 7th, 1896.

UNION TRUST COMPANY OF NEW YORK,
By BAUSMAN, KELLEHER & EMORY,
Its Solicitors.

NATIONAL BANK OF COMMERCE OF PROVIDENCE,
By BAUSMAN, KELLEHER & EMORY,
Its Solicitors.

MANSON F. BACKUS,
As Receiver of the Ranier Power & Railway Company,
By LICHTENBERG, SHEPARD & LYON.
CHARLES H. BAKER,
Doing Business as Charles H. Baker & Company,
By STRATTON, LEWIS & GILMAN,
His Solicitors.

45

WILLIAM COCHRANE,
By STRATTON, LEWIS & GILMAN,
His Solicitors.

WASHINGTON SAVINGS BANK AND C. M. SHEAFE, *Its Receiver,*
By CLISE & KING, *Their Solicitors.*
MALCOLM McDONALD AND JAMES OLDFIELD,
By DANIEL T. CROSS, *Their Solicitors.*
CITY OF SEATTLE,
By W. T. SCOTT,
JOHN K. BROWN, *Its Solicitors.*
JOHN LEARY AND J. W. EDWARDS,
By HARDIN & FERRY, *Their Solicitors.*
COMMERCIAL NATIONAL BANK OF SEATTLE,
By L. H. WHEELER, *Its Solicitors.*

(Endorsed:) Waiver of joinder in appeal. Filed Apr. 14, 1896. In the U. S. circuit court. A. Reeves Ayres, clerk, by R. M. Hopkins, deputy.

UNITED STATES OF AMERICA, }
District of Washington, } ss:

Clerk's Certificate to Transcript.

In the Circuit Court of the United States for the District of Washington, Northern Division.

46 I, A. Reeves Ayres, clerk of the circuit court of the United States for the district of Washington, do hereby certify that the foregoing thirty-four (34) typewritten pages, numbered from 1 to 34, inclusive, contain in themselves, and not by reference, a complete record and transcript of the final record, and of all the papers, exhibits and depositions and other proceedings which are necessary to the hearing of the appeal of the Third Street & Suburban Railway Company, in a case numbered 466 in this court, wherein Meyer Lewis is complainant, and The Western Mill Company and others, including said railway company, are defendants. And I do further certify that the waiver of joinder in appeal, dated April 7th, 1896, among the within writings, contains the signatures of the solicitors of all the defendants, who have at any time appeared in this action. And I further certify that the cost of preparing and certifying the foregoing transcript is the sum of nineteen dollars and forty-five cents ($19.45), and that the said sum has been paid to me by the appellant, The Third Street & Suburban Railway Company. No opinion has been given or filed in said cause.

In witness whereof, I have hereunto subscribed my name and affixed the seal of said circuit court, at my office, in the city of Seattle, in said district, this 30th day of April, 1896.

[SEAL.] A. REEVES AYRES,
Clerk of the Circuit Court of the United States for the District of Washington,
By R. M. HOPKINS, *Deputy Clerk.*

47 In the Circuit Court of the United States for the District of Washington, Northern Division.

MEYER LEWIS, Plaintiff,
vs.
WESTERN MILL COMPANY, a Body Corporate under the Laws of Washington; D. T. Denny, John Leary, John Keenen, R. R. Lombard, J. W. Edwards, James Frankland, Malcolm McDonald, James Oldfield, William Cochrane, David T. Denny, Manson F. Backus, Receiver of the Ranier Power & Railway Company, a Corporation Organized and Existing under the Laws of Washington; Union Trust Company of New York, a Corporation Organized and Existing under the Laws of the State of New York; The City of Seattle, a Municipal Corporation Organized and Existing under the Laws of the State of Washington; Charles H. Baker, Doing Business as Charles H. Baker & Company; A. P. Fuller; National Bank of Commerce of Providence, a Corporation Organized and Existing under the Act of Congress Known as the National Bank Act and the Acts Mandatory and Supplementary Thereto; Merchants' National Bank, a Corporation; Seattle Hardware Company, a Corporation; Commercial National Bank of Seattle, Nelson W. Parker, W. Hammond Wright; C. M. Sheafe, Receiver of the Washington Savings Bank; Third Street & Suburban Railway Company, a Corporation, and Thomas Boyd, Defendants. } No. 400.

48 *Citation on Appeal.*

UNITED STATES OF AMERICA, *ss:*

To Meyer Lewis, Greeting:

You are hereby cited and admonished to be and appear at a term of the circuit court of appeals of the United States, for the ninth circuit, to be holden at San Francisco, in the State of California, within thirty days from the date of this citation, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the district of Washington, wherein Third Street & Suburban Railway Company is appellant, and Meyer Lewis is respondent, to show cause, if any there be, why the decree in the said appeal mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 8th day of April, in the year of our Lord one thousand eight hundred and ninety-six.

[SEAL.] C. H. HANFORD, *Judge.*

STATE AND DISTRICT OF WASHINGTON, } ss:
County of King, }

I, the undersigned solicitor of record for Meyer Lewis, the plaintiff herein and appellee, acknowledge service of a copy of the foregoing citation upon me this 14th day of April, 1896.

MORRIS B. SACHS AND
CHARLES F. FISHBACK,
Solicitors for Meyer Lewis, Plaintiff and Appellee.

49 I hereby certify that I served the foregoing citation upon E. S. Lyons, solicitor of record for complainant herein, at Seattle, Wash., on the 15th day of April, 1896, by delivering to him a true copy of this writ.

Dated at Seattle the 15th day of April, 1896.

JAMES C. DRAKE,
U. S. Marshal,
By GEO. W. CURTIS, *Deputy.*

(Endorsed:) Citation on appeal. Filed Apr. 14, 1896. In the U. S. circuit court. A. Reeves Ayres, clerk, by R. M. Hopkins, deputy.

No. 298. U. S. circuit court of appeals for the ninth circuit. Third Street and Suburban Railway Company, appellant, *vs.* Meyer Lewis. Transcript of record. Appeal from U. S. circuit court, district of Washington, northern division. Filed May 4th, 1896. F. D. Monckton, clerk.

50 In the Circuit Court of the United States, District of Washington, Northern Division.

MEYER LEWIS, Plaintiff,
vs.
THE WESTERN MILL COMPANY ET AL., Defendants.

Notice of Lien.

To the plaintiff, Meyer Lewis; to the defendant The Third Street & Suburban Railway Company; to the remaining defendants herein, and to whom it may concern:

You are hereby notified that I, Ernest S. Lyons, as one of plaintiff's solicitors herein, claim an attorney's lien in the sum of two hundred and fifty dollars ($250.00) on that certain judgment and decree entered in the above cause on the 31st day of March, 1896, in said cause and which decree was in favor of plaintiff and against the above defendants for the sum of twenty-four thousand one hundred and thirty dollars; that said sum of two hundred and fifty dollars is claimed by me as reasonable compensation for professional services rendered to plaintiff in the conduct and management of the above-entitled cause to the date hereof.

ERNEST S. LYONS.

Dated Sept. 15, 1896.

(Endorsed:) Notice of lien. Filed Sept. 28, 1896. F. D. Monckton, clerk U. S. circuit court of appeals, 9th circuit.

51 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE THIRD STREET AND SUBURBAN RAILWAY COMPANY, Appellant,
vs.
MEYER LEWIS, Appellee.
} No. 298.

Appeal from the circuit court of the United States for the district of Washington, northern division.

Frederick Bausman, for the appellant.
Morris B. Sachs for the appellee.

Before Gilbert and Ross, circuit judges, and Hawley, district judge.

GILBERT, *Circuit Judge:*

The appellee was the complainant in a suit brought to foreclose a mortgage on certain real property in the city of Seattle. His supplemental bill alleged in substance that on May 14, 1884, the Western Mill Company, a corporation, executed its promissory note to the complainant in the sum of $20,000, payable three years after date, with interest at nine per cent. per annum, and to secure the same executed its mortgage on certain lots in the city of Seattle; that the interest on said note and mortgage has been paid to December 14, 1893, but not thereafter; that on October 14, 1891, the mortgagor sold and conveyed the said mortgaged premises to the Ranier Power & Railway Company, a corporation, and that on or about February 13, 1895, in a cause pending in the circuit court of the United States for the district of Washington, in which A. P. Fuller was complainant and The Ranier
52 Power & Railway Company was defendant, the master in chancery of said court executed and delivered to A. M. Brookes, Angus McIntosh, and Frederick Bausman, who were the purchasers of said lots at a sale had to satisfy the decree rendered in said cause, a deed of sale to said mortgaged premises, and that on February 12, 1895, the said McIntosh, Brookes, and Bausman conveyed the same unto the Third Street & Suburban Railway Company; that the interest of said last-named corporation is subject to the lien of the mortgage. To this bill the Third Street & Suburban Railway Company, the appellant, made answer, alleging that the Ranier Power & Railway Company, immediately after receiving its conveyance of said lots from the mortgagor, applied the said property to railway uses and erected thereon a power-house for its railway; that on June 13, 1893, the assets of said Ranier Power & Railway Company passed into the hands of Manson F. Bacchus, receiver in the suit of Fuller against said company, mentioned in the bill; that said receiver, under the order of the court, operated

the railway properties and power-house, and on August 8, 1894, under the order of the court, issued receiver's certificates upon all the property of said railway company, including the lands described in the bill; that the certificates were by the court adjudged to be necessary and essential to the continued existence of the railroad company and were made upon the petition of the receiver, showing that the operating expenses of the company exceeded its gross receipts, and that unless money were raised by means of these certificates the property would have to be abandoned, and that the order of court made the certificates a first lien upon all property in the receiver's hands, including the mortgaged premises; that subsequently the certificate-holders petitioned the court to
53 enforce the lien, and that thereupon, under the order of the court, all the property in the receiver's hands was sold on January 28, 1895, as alleged in the bill; that the sale was thereafter confirmed, and on February 12, 1895, the purchasers conveyed the same to the Third Street & Suburban Railway Company. The answer further alleges that the Ranier Power & Railway Company was a corporation organized with railway powers and owned public franchises for railway purposes; that the complainant did not seek to foreclose his mortgage at the time of the transfer of the land to said corporation, but forbore to do so for more than two years following, during which period the mortgage was overdue, but that he accepted interest on the loan from said railway company and thereafter accepted interest from the receiver; that the receiver, before the foreclosure suit was begun, paid taxes and insurance upon the lands to the amount of $3,000; that while the complainant was not a party to the suit in which the receiver's certificates were issued, he had knowledge of that suit and of the receivership and accepted interest from the receiver with knowledge of the litigation and of all the facts alleged in the answer, and during the space of eleven months forbore to foreclose his mortgage, and permitted the receiver with the trust funds to protect the mortgaged property; that about three months before the issuance of the receiver's certificates he caused his appearance to be entered in said cause for the purpose of obtaining leave to sue the receiver, but did not ask to be made a party to the cause nor did he serve notice of his appearance upon any of the parties; that the sale under the receiver's certificates was known to the complainant both before and after its date, but he has not sought to disturb it or filed objection thereto. A demur-
54 rer to the amended answer was sustained by the circuit court, and, the defendant answering no further, a decree of foreclosure was thereupon entered. The order sustaining the demurrer is assigned as error on the appeal to this court.

It is contended by the appellant that by virtue of the facts set forth in its amended answer the complainant's mortgage lien has been extinguished, and that the appellant holds its property under the title acquired at the judicial sale, which was made to satisfy the receiver's certificates, free from all prior incumbrance. It is not contended that the lien of the complainant's mortgage has been adjudged to be second to that of the receiver's certificates upon a hear-

ing had to determine the respective rights and priorities of those incumbrances, nor that the complainant has had his day in court, but it is urged that the actual knowledge which the complainant had of the proceedings of the court, the issuance of the certificates, the adjudication of their necessity and of their priority, is tantamount to legal notice or service of process upon him. To sustain this view of the law, we are referred to the decision of the Supreme Court in Union Trust Co. *v.* Illinois Midland R. Co., 117 U. S., 434, in which it is said: "A full opportunity, as in this case, to be heard on evidence as to the propriety of the expenditures and of making them a first-class lien is judicially equivalent to prior notice. The receiver and those lending money to him on certificates issued on orders made without prior notice to parties interested take the risk of the final action of the court in regard to the loans. The court always retains control of the matter. Its records are accessible to lenders and subsequent holders, and the certificates are not negotiable instruments." This expression of opinion was uttered in the case
55 of a foreclosure of railroad mortgages in which the court had had occasion to advert to the nature of that class of liens and the necessity for preserving the road as a going concern, together with its franchises, not only for the benefit of the corporators, but as a public highway, and had said that its creditors or the holders of its obligations must necessarily be held to have received the same in view of these peculiar facts and with the understanding that if it fall into insolvency and its affairs come into a court of equity for adjustment, it may become necessary to make repairs or pay the costs of operation, and for that purpose to borrow money upon the credit not only of its earnings, but of its corpus. The court held, it is true, that the certificates of receivers might, in case of urgency, where legal notice was not practicable, be issued under the order of the court for the preservation of the property and the protection of the bondholders, and that in such a case prior notice to incumbrancers or to all the parties interested was not absolutely necessary, but that the question of the priority of such receiver's certificates over the liens of persons to whom notice was not given or who did not consent might be subsequently adjudicated, and that the takers of such receiver's certificates must be expected to receive the same subject to such contingency; but the facts upon which the decision was rendered in that case differ in substantial features from the present case. The complainant here did not lend his money upon railroad security. He loaned it upon lots in a city, which were subsequently sold to a street railway company subject to his lien, and by the latter were used as the site of a power-house. The fact that he failed to foreclose his mortgage immediately on such transfer, or that he received from the railway corporation or
56 from the receiver appointed subsequently in a suit against said corporation the interest which came due upon his mortgage does not in any way change his rights or estop him to enforce his lien as an ordinary mortgage upon real estate. Assuming it to be true that he had actual notice of all the steps taken in the suit in which the receiver's certificates were issued, and that he made no

appearance in said court and no opposition to said proceedings, he is not thereby precluded from proceeding to foreclose his mortgage upon default of the interest on the same. The foreclosure suit was begun some two months before the hearing on the petition for the order to sell the real estate to satisfy the receiver's certificates. The holders *to* those certificates and the parties to that suit had the opportunity to cause the complainant to intervene in said proceedings and submit to the court the question of the priority of his lien. They declined to do so. They were chargeable with the record notice of his lien from the first, and the complainant, in view of their conduct, might justly assume that it was not their intention to dispute his prior lien or to attempt to create a lien in advance thereof, and that in selling the property, as the same was sold, in a proceeding to which he was not made a defendant, it was the intention to recognize his mortgage and to sell the property subject thereto. In making the expense of operating a railroad a charge upon it in preference to the mortgage liens, courts of equity have acted with extreme caution, and have exercised the extraordinary power only upon the theory that the holder of such a mortgage lien takes the same subject to the implied condition that in case of the insolvency of the railroad company it may become necessary under a receivership to borrow money for the purpose of preserving its value and
57 protecting its franchises for the benefit of all interested therein. The power has generally been exercised only after notice to all parties to the litigation, and if without such notice or if before the time when the prior lienholders become parties to the suit receiver's certificates are issued by authority of the court, such prior lienholders, when they are subsequently brought before the court, will always be given the opportunity to contest the priority of the receiver's certificates over their liens. In Mercantile Trust Co. *v.* Kanawha & Ohio Railway Co., 7 C. C. A., 3, it was held that the holder of a receiver's certificate is put upon inquiry as to all that has been done in the litigation in which the certificate was authorized, and that he is charged with notice of all subsequent proceedings therein and of the fact that by the final action of the court the validity of the certificate may be prejudicially affected, and that a final decree in a foreclosure suit against a railway company, vesting the purchasers at the foreclosure sale with a title free from all liens for receiver's debts, operates to set aside so much of a previous order as has made the receiver's certificates a paramount lien on the road; but the mortgagee in this case does not stand in the attitude of the ordinary lender of money upon railroad security. His loan was made upon real estate only, and not in contemplation of its subsequent application to railroad uses. Upon what principle of equity can it be said that his mortgage has become subordinated to the uses for which the property was thereafter devoted, so that it has lost its character of a mortgage upon real estate and has now, by virtue of the insolvency of the railway company, become extinguished by a lien created by a receiver for the purpose of maintaining other property of the company? At the time when
58 the mortgage loan was made the security presumably was and still is of sufficient value to satisfy the complainant's

lien. For the protection of that lien he has not, so far as the facts are disclosed in the pleadings, required the intervention of a court of equity, nor is it shown that any expense has been incurred by the receiver which was necessary or advantageous to the protection of his security.

The appellant insists that there is ground for the equitable preferment of the receiver's certificates over the complainant's lien in the fact that the receiver, before the commencement of this foreclosure suit, paid out of the assets of said railway company for insurance and taxes on the mortgaged property the sum of $3,000, thereby reducing the assets of the company and in part creating the necessity for the issuance of the certificates. We are unable to see how this contention can be sustained. If the receiver paid taxes and insurance it was in the discharge of his duty and in the course of business and for the purpose of protecting the property as it was and possibly for the purpose of averting a suit by the complainant to foreclose his mortgage. The greater portion of the sum so paid is evidently on account of the improvements placed upon the property by the railway company, and not for taxes upon the lots which were the subject of the complainant's mortgage. If the taxes had remained unpaid they would now be an additional charge upon the real estate, and the complainant in his decree of foreclosure would be entitled to have that amount also paid out of the security. The mortgage contemplated this, and it is not shown that the value of the property is inadequate to meet such increased charge upon it.

In any view of the facts alleged in the amended answer they
59 constitute no defense to the bill, and the demurrer was properly sustained. The decree will be confirmed, with costs to the appellee.

(Endorsed:) Opinion. Filed Feb. 8, 1897. F. D. Monckton, clerk.

60 United States Circuit Court of Appeals for the Ninth Circuit
October Term, 189–.

THIRD STREET & SUBURBAN RAILWAY COMPANY, Appellant,
v.
MEYER LEWIS, Appellee. } No. 298.

Appeal from the circuit court of the United States for the district of Washington, northern division.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Washington, northern division, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, affirmed, with costs to the appellee.

(Endorsed:) Decree. Filed Feb. 8, 1897. F. D. Monckton clerk.

61 [Endorsed:] No. —. United States circuit court of appeals for the ninth circuit, October term, 189–. Decree. Filed —— —, 189–. —— ——, clerk.

62 In the Supreme Court of the United States.

THE THIRD STREET & SUBURBAN RAILWAY Company, Appellant, *vs.* MEYER LEWIS, Appellee. } Petition for Appeal.

To the honorable the justices of the Supreme Court of the United States:

The petition of The Third Street & Suburban Railway Company, appellant in the above-entitled cause, respectfully shows:

Appellee Lewis commenced this action in the circuit court of the United States, 9th circuit, for the district of Washington against the Western Mill Company and others, including The Third Street & Suburban Railway Company, now appellant, for foreclosure of a certain mortgage, and the present appellant railway company did, by answer in that foreclosure, set up alleged title superior to the lien of the mortgage, and derained title to itself from certain receiver's certificates issued by the circuit court of the United States for the district of Washington. These receiver's certificates had been issued in a cause in which one Fuller was complainant and The Union Trust Company of New York and others, defendants, and it had been issued by the circuit court aforesaid on a showing made by the receiver in the cause of Fuller against the trust company *et al.* to the effect that such certificates were necessary to the operation and preservation of the railway property then in the hands of that court in that cause. These certificates the said circuit court for the district of Washington did order and establish as a first lien upon all the properties in the hands of the receiver, including the property now sought to be foreclosed upon by appellee, Meyer Lewis. Such pro-

63 ceedings were had in the cause of Fuller against the trust company and others that all the property was subsequently sold to satisfy their lien, including the property now sought to be foreclosed upon. At the sale certain persons became purchasers who conveyed to the present appellant, The Third Street & Suburban Railway Company, said sale having been in all things by the circuit court for the district of Washington confirmed. In the present foreclosure case of Meyer Lewis against The Western Mill Company all the aforesaid was set up as a defense, as will more clearly and at large appear in the certified record herewith presented to your honors. The circuit court for the district of Washington, in which appellee Lewis brought this present foreclosure, adjudged the lien of the mortgage to be superior to that of the receiver's certificates and the title of this appellant, The Third Street & Suburban Rail-

way Company, through them derived, and this decision was by the circuit court of appeals for the 9th circuit affirmed.

II.

Your petitioner conceives himself aggrieved by the decision of the circuit court of the United States for the district of Washington and by that of the United States circuit court of appeals for the 9th circuit, and desires to have the judgment of both of said courts reviewed by appeal from the judgment of the circuit court of appeals for the 9th circuit to the Supreme Court of the United States, and now alleges and shows, as from the certified record will at large and more clearly appear, that the defense relied upon by this appellant, The Third Street & Suburban Railway Company, as hereinbefore narrated, constituted a Federal question and is not within that class of cases in which the decision- of the circuit courts of appeals
64 are final, and that the Federal question in this is that the grantors of this appellant, The Third Street & Suburban Railway Company, having purchased at a sale of property under receiver's certificates by a court of the United States, have derived their title under the laws of the United States and claim a right, privilege, and immunity under an authority exercised under the laws of the United States.

Wherefore your petitioner, conceiving itself to be aggrieved and damaged by the judgment of the United States court of appeals for the 9th circuit, and in order to obtain relief therein and have opportunity to show the errors complained of, respectfully prays that an appeal be allowed from the judgment of said United States circuit court of appeals to the Supreme Court of the United States, and that proper orders be made herein touching the security required on appeal, and to otherwise cause to be done what by right should be done in your petitioner's behalf.

FREDERICK BAUSMAN,
Counsel for Petitioner and Appellant.

(Endorsed:) Petition for appeal to Supreme Court U. S. Filed Nov. 19, 1897. F. D. Monckton, clerk.

65 In the Supreme Court of the United States.

THE THIRD STREET & SUBURBAN RAILWAY COMPANY, Appellant,
vs.
MEYER LEWIS, Appellee.

Comes now The Third Street & Suburban Railway Company, appellant, and says:

In that certain cause pending in the United States circuit court of appeals for the ninth circuit, in which the above-named railway company is appellant and the above-named Meyer Lewis is appellee, this error, as shown by the records and proceedings, there occurred, to wit:

That the circuit court of appeals for the ninth circuit erred in af-

firming the decree of the circuit court of the United States for the district of Washington in the above-entitled cause, and in causing final judgment to be entered therein against this appellant on the 8th day of February, 1897.

II.

That the United States circuit court of appeals for the ninth circuit erred in sustaining demurrer of the appellee Lewis to the amended answer of the appellant railway company.

FREDERICK BAUSMAN,
Counsel for Appellant.

(Endorsed:) Assignment of errors. Filed Nov. 19, 1897. F. D. Monckton, clerk.

66 In the Supreme Court of the United States.

THE THIRD STREET & SUBURBAN RAILWAY COMPANY, Appellant,
vs.
MEYER LEWIS, Appellee.

Order Allowing Appeal.

It appearing to the Honorable Stephen J. Field, one of the justices of the Supreme Court of the United States, by the petition of appellant for an appeal from decree of the United States circuit court of appeals for the 9th district to the Supreme Court of the United States in the cause in which The Third Street & Suburban Railway Company is appellant in the latter court and Meyer Lewis is appellee, and it appearing further by appellant's assignments of error, petition for the appeal, and by the record in this case that this cause was one wherein is involved a Federal question, to wit, a right and immunity claimed under a title and authority under the laws of the United States, it is ordered that an appeal from the United States circuit court of appeals be, and the same is hereby, allowed, and it is further ordered that the amount of security to be given by said appellant on appeal shall be, and the same is hereby, fixed at the sum of $500, and that such security be conditioned as by law in such cases made and provided and to operate merely as security for costs and not as supersedeas.

Dated this 26th day of October, 1897.

STEPHEN J. FIELD,
One of the Justices of the Supreme Court of the United States.

(Endorsed:) Order allowing appeal to Supreme Court U. S. and fixing amount of bond. Filed Nov. 19, 1897. F. D. Monckton, clerk.

67 Know all men by these presents that we, Third Street and Suburban Railway Company, as principal, and A. M. Brookes and W. J. Grambs, as sureties, are held and firmly bound unto Meyer Lewis in the full and just sum of five hundred dollars, to be paid to the said Meyer Lewis, his certain attorney, executors, ad-

ministrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 1 day of November, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas lately, at a term of the U. S. circuit court of appeals for the 9th circuit, in a suit depending in said court between Third Street and Suburban Railway Company, appellant, and Meyer Lewis, appellee, a decree was rendered against the said Third Street and Suburban Railway Company, and the said Third Street and Suburban Railway Company having obtained appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said Meyer Lewis, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within sixty days from the date thereof:

Now, the condition of the above obligation is such that if the said Third Street and Suburban Railway Company shall prosecute its appeal to effect and answer all costs if it shall fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THIRD STREET & SUBURBAN RAILWAY CO.,
By FRED'K BAUSMAN. [SEAL.]
A. M. BROOKES. [SEAL.]
W. J. GRAMBS. [SEAL.]

68 Sealed and delivered in presence of—
FRED'K BAUSMAN.

Certified by—
C. H. HANFORD,
United States District Judge, District of Washington.

Approved by—
STEPHEN J. FIELD,
Associate Justice Supreme Court of the United States.

(Endorsed:) Bond on appeal to Supreme Court U. S. Filed Nov. 19, 1897. F. D. Monckton, clerk.

69 United States Circuit Court of Appeals for the Ninth Circuit.

THIRD STREET & SUBURBAN RAILWAY COMPANY, Appellant,
v.
MEYER LEWIS, Appellee. } No. 298.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing sixty-seven (67) pages, numbered from one (1) to sixty-seven (67), both inclusive, to be a true copy of the record and of the assignment of errors and of all proceedings in the above-entitled cause, including the opinion filed, as the originals thereof remain and appear of record

in said circuit court of appeals, and that the same constitute the transcript on appeal to the Supreme Court of the United States in said cause.

Attest my hand and the seal of said United States circuit court of appeals, at San Francisco, California, this 24th day of November, A. D. 1897.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

70 UNITED STATES OF AMERICA, *ss:*

To Meyer Lewis, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, persuant to an order allowing an appeal filed in the clerk's office of the United States circuit court of appeals for the ninth circuit, wherein Third Street & Suburban Railway Company is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Stephen J. Field, associate justice of the Supreme Court of the United States, this twenty-sixth day of October, in the year of our Lord one thousand eight hundred and ninety-seven.

STEPHEN J. FIELD,
Associate Justice of the Supreme Court of the United States.

71 [Endorsed:] No. 298. United States circuit court of appeals for the ninth circuit. Third Street and Suburban Railway Company, appellant, *v.* Meyer Lewis, appellee. Citation on appeal to Supreme Court U. S. Filed Nov. 24, 1897. F. D. Monckton, clerk U. S. circuit court of appeals, ninth circuit.

On this 24th day of November, in the year of our Lord one thousand eight hundred and ninety-seven, personally appeared before me, the subscriber, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, Meredith Sawyer, of lawful age, to wit, over the age of 21 years, and makes oath that he delivered a true copy of the within citation to Meyer Lewis, the appellee within mentioned, at No. 1000 Sutter St., in the city and county of San Francisco, California, on the 20th day of November, A. D. 1897.

Sworn to and subscribed the 24th day of November, A. D. 1897.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk U. S. Circuit Court of Appeals, Ninth Circuit.

Endorsed on cover: Case No. 16,750. U. S. C. C. of appeals, ninth circuit. Term No., 212. Third Street and Suburban Railway Company, appellant, *vs.* Meyer Lewis. Filed December 15, 1897.

No. 212

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1898

THIRD STREET AND SUBURBAN RAILWAY COMPANY,
Appellant

vs.

MEYER LEWIS.

Appeal from the United States Circuit Court of Appeals For the Ninth Circuit

BRIEF AND ARGUMENT FOR APPELLANT

STATEMENT.

Our answer, on which (p. 13) we elected to stand, states the case with sufficient clearness, perhaps, and conciseness. The title conveyed by a sale under receiver's certificates is in question. Those who purchased from the purchasers at that sale bought on the faith of instruments that constituted on their face a first lien, but they are now called into court by Meyer Lewis, who asserts that a prior lien belonging to him has not been cut off. That the property on which Meyer Lewis claimed this lien, though originally city lots belonging to a mill company, had been conveyed to a railway com-

pany, that the railway company had made railway uses of it, that after the principal of the loan was overdue and presumably could have been foreclosed, he had continued for years to accept interest from the railway company, that the railway company, becoming insolvent, passed into the hands of a receiver, that the court had jurisdiction of the property when it issued certificates, that a railway company in the hands of the court was the owner of the property, that the certificates were issued to keep the railway in existence as a *quasi* public creature, that the certificates were placed upon all the property in the hands of the court including that now claimed by Meyer Lewis, that they were issued and sold as a first lien on all, that Meyer Lewis knew of their asserted lien and issue, but did not complain of them, that he knew of the sale under them but did not object, and that he knew of the confirmation of that sale but did not seek to set it aside, are allegations of our answer. These allegations are admitted by his demurrer sustained below. It is also by the same pleadings admitted that not only did Meyer Lewis have this knowledge of what was going on in the receivership, but that he had himself relations with the court, that he accepted payments of interest on his lien before the issue of certificates as well as suffered the court to aggravate the insolvency of the trust, then running behind its operating expenses in the court's hands, by the payment of taxes and insurance on that part of the estate which he now claims free of all liens except his own. Lastly, it is admitted that the cause in which these certificates were issued is still open and pending, so that Meyer Lewis may object to the certificates there or claim his share of the proceeds of the sale or his priority over other shares.

SPECIFICATIONS OF ERROR.

The lower courts erred in sustaining the demurrer to our answer because:

I. The lien of Meyer Lewis' mortgage was wholly cut off by the unchallenged first lien of the certificates.

II. The lien of his mortgage was subject to deductions in equity on account of the sums spent by the court to protect that part of the insolvent estate and the interest paid him, which disbursements had made the certificates all the more necessary and have enabled him to profit by the court's subsequent loan while repudiating the lien on which it was obtained.

III. The sale under the certificates was presumably for the benefit of all persons interested in the estate and Mye Lewis, since he does not seek to set aside the sale, should be relegated to that court for his share of the proceeds or show why he would not be entitled to any.

IV. Meyer Lewis cannot collaterally attack the order creating the first lien of these certificates.

ARGUMENT.

Our specifications of error may be conveniently discussed by a division of our argument into the two prayers of our answer—*first*, that the mortgage is entirely cut off by the certificates; *second*, that in any event the mortgage must be charged with some of the expenses of the court.

FIRST.

THE MORTGAGE WAS WHOLLY CUT OFF BY THE CERTIFICATES.

If these certificates are not the absolute first lien they purported to be, it must be for one or all of three reasons. (*a*)

Because Meyer Lewis had not formal notice of the issue. (*b*) Because he was not a party to the action in which they were issued. (*c*) Because he was not a railway creditor and was not liable to the railway doctrines on which receiver's certificates are issued. These objections we shall answer in turn, and this will dispose of that part of the prayer of our answer which demands that the Meyer Lewis mortgage be cut off entirely. Then we shall proceed to consider the second part of our prayer, which demands that, before absolving himself entirely of the lien of the certificates, Meyer Lewis be at least forced to credit upon his mortgage such sums as upon hearing shall have been expended or paid by the receiver to him or upon his property by insurance, interest, and taxes.

(*a*)

WAS NOTICE NECESSARY TO THE ISSUE.

If the court had any right at all to bind a lien like that of Meyer Lewis with receiver's certificates, notice, it must at this date be admitted, would not be necessary. This court has itself so decided in *Union Trust Company vs Illinois Midland Company*, 117 U. S. at page 456:

"Its power to do this does not depend on consent, nor on prior notice. *Consent is desirable, but seldom praeticable*, where the debts exceed the value of the property. Though prior notice to persons interested, by notifying them as parties, first requiring them to be made parties if they are not, is generally the better way, yet many circumstances may be judicially equivalent to prior notice. A full opportunity, as in this case, to be heard, on evidence, as to the propriety of the expenditures and of making them a first lien, is judicially equivalent."

The reason why notice is not indispensible will be clear from a striking parallel which occurs to us between the power

of a court to issue these certificates and the power of a government to levy taxation. Each power is an inherent attribute of sovereignty. Each is based on the theory of protection returned. Each is based on the theory of common benefit, that is to say, as in taxation the test of the levy is public purpose, so in receiver's certificates the test is the common necessity, which, if it be shown to have existed, always relates back and cures every irregularity. Now, the power of taxation may be exercised without notice. There are certain fundamental grounds upon which taxation, even if the constitution be silent, may be resisted, but want of notice is not one of them. As a matter of fact, notice is generally provided for in legislation of this kind, but, except when constitutions require it, is not an indispensible part of a tax law. If it were, the powers of a government would be most seriously hampered in that power which alone preserves it in the emergencies of nations. It is so with certificates issued by a court to preserve property of this kind in its hands. Notice may be convenient, is generally resorted to, but is not indispensible. Indeed, it would at times be so obviously inconvenient, that, to have to resort to it, would be to defeat the very purpose for which the power is exercised. A long line of railway, traversing perhaps many states, or ramifying through many subdivisions of them, and possessing estates of very many kinds, will involve so many interests, such an innumerable variety of rights and liens, that, if the court were compelled to give notice and hearing to them all in order to create that fund which is intended to preserve them all and to sustain the obligations of the court itself, the right could scarcely ever be exercised successfully and seldom with expedition. But expedition is sometimes the essence of the thing. Suppose the power house and cars of a street railway

system are destroyed of a sudden by fire. Must the road stand idle, the franchise be lost to the owners or lienors, the public inconceivably annoyed, unless all interested parties be duly notified, some of them not yet in court and subject to speedy notice? Certainly not. It is the inherent right of the court to preserve the properties by a summary loan. So far as this case is concerned, an ample opportunity to be heard seems to have been afforded one who assumed relations with the court, accepted interest from it, knew of its proceedings, and who, after appearing in the cause, did not even take the trouble to notify others of that appearance.

We shall again have occasion to refer to this parallel between receiver's certificates and a government tax, under that part of our brief which argues that the Meyer Lewis mortgage must suffer some deductions for the interest paid him, and the insurance and taxes paid for him. The expenses of the court, even without an express levy through certificates, are judicial taxation.

(*b*)

MEYER LEWIS NOT A PARTY TO THE CAUSE IN WHICH CERTIFICATES WERE ISSUED.

Possibly it may be argued that a person must at least be a party to the cause in which certificates are issued, and that it is then that notice may be dispensed with. Has it been held accordingly that certificates will bind those who were not even parties to the cause? We think it has. In the case already cited of *Union Trust Company vs. Illinois Midland Company* we notice that on page 454 certificates were issued before certain persons were made parties.

"When the order of October 9th, 1876, was made, under which the six certificates of the 8th series were issued, neither

the trustees nor any of the bondholders of the Paris and Decatur Company were parties to the suit."

These certificates the court upheld, on page 458, saying:

"In allowing the certificates of the 8th and 14th series for necessary repairs with priority, the master (in chancery) acted, and we think properly, on the authority of *Wallace vs. Loomis* and *Miltenberger vs. Logansport R'y Co.*"

It seems quite clear that if, as is indisputable, notice is not necessary to bind those who are already parties, it ought to be no more necessary to bind those who are not yet parties. It is enough if the property is in the hands of the court to be conserved. It is enough, to recur to our pararallel of government taxation, that the estate of the non-resident be within the jurisdiction. He gets his protection and he must pay his taxes. If that tax be improper, excessive, or irregular, there is an appropriate way to correct it, and that way, as we shall subsequently show, is by petition to the court that levies the tax. If it once be conceded that notice is not necessary to those already parties, it will necessarily follow that it is not necessary to those who in fact are not parties. Certainly one may be as much injured by the lack of notice in the one case as in the other, and if the theory upon which notice can be dispensed with in the former case be correct, it will apply as well to the latter. Must the court wait until it gets into the action all the countless creditors of a railway company before it can make that loan which may preserve the properties for the benefit of all, and which, if it have a rightful existence at all, must inevitably protect one as much as it does the other? We think it will hardly be contended that it was necessary that Meyer Lewis be a party to this cause

before these certificates, if otherwise valid, could bind him.

(*c*)

WAS MEYER LEWIS IN THE POSITION OF A RAILWAY CREDITOR?

The Circuit Court of Appeals in its opinion, which we will hereafter examine, has made the ground of its sustaining the priority of Meyer Lewis' lien, not only in whole but in part, that, conceding to be true all that we have just been arguing about the power of a court to issue certificates with or without notice, it does not apply to any other person than those who lent their money to a railway company at the outset. These, it is said, and these alone, are bound by those loans which a court may make to preserve railway properties.

To this we have, as is hereafter argued, two replies. One, that Meyer Lewis, after his loan was overdue and could have been entirely called in, suffered the property to be improved by the railway company, and, during several years before its receivership, accepted the interest at its hands. Then, after the appointment of its receiver, he accepted interest at the hands of the court, and suffered the property to remain there almost a year without objection. This man, we think, has brought himself fully within the position of a creditor of a railway company in so far as following the fortunes of its insolvency and operation is concerned. He permitted the railway to build upon the property, apparently without objection, that which was most vital to its operation—its power house. He is now willing to take that property with the improvements entirely away from the railway company just as if he had never had anything to do with it as a railway corporation. His acceptance of interest from the receiver and his permitting the receiver to pay insurance and taxes upon that property when

the road was being operated at a loss by the receiver, we shall advert to in discussing the opinion of the lower court, and there we shall maintain that, without regard to railway doctrines and simply on grounds of general equity, he cannot so behave himself, without some recompense to the court for its protection. At present it is enough to say, that the course of action kept up through several years by Meyer Lewis is not compatible with his stubbornly refusing to have that relation now imposed upon him by a court, when for four years, and, apparently, so long as profitable, he kept it up himself. It seems to us very clear that if Meyer Lewis can snatch this property entirely from the hands of the court the other properties covered by the lien of the certificates will have to bear the whole burden. Those certificates, however, as is alleged, were spread over all the property, including his.

SECOND.

THE MORTGAGE MUST BEAR SOME SHARE OF THE COURT'S EXPENSES.

This is the second branch of our argument, and it depends upon no doctrine of railway insolvency. General equitable doctrines alone need be considered. The certificates merely represent the expenses previously incurred by the court, interest paid to Meyer Lewis in protecting, with the acquiescence of Meyer Lewis, the property on which he had a lien. Even had no certificates been issued, it is evident from the answer that the expenses of the court were exceeding its income and the care of that property which Meyer Lewis had not sought to withdraw from the court had aggravated the deficit. Could, then, the latter avoid his share of the expenses of a court of equity and withdraw his property from its pro-

tection without charge of any kind, when, during nearly a year, he had deliberately elected to have that protection?

The reasoning of the lower appellate court against us may be summed up as follows: Meyer Lewis did not have a hearing before the issue of these certificates. Had he been a railway mortgagee, a hearing, or even notice might not, to be sure, have been necessary, for he would then have been held to accept the fortunes of that class of security. But he was not a railway mortgagee. He lent his money only on city lots and he is not to be put in the position of a railway creditor by his continuing the loan even for years when overdue and after the property had been conveyed to a railway company, or by the railway company's devoting it to railway uses and improving his security with a power-house, or by his accepting interest from the railway receiver while the trust was not yielding operating expenses, or by suffering the court, through that receiver, to pay insurance and taxes on the property, and to sink the estate so much deeper in debt in doing so. The certificates might affect everyone else, but they did not affect him. His lien was not cut off, and it did not have to sustain an equitable accounting in part. He could, in a word, repose with perfect indifference to what the court he knew was doing both for his property and with it. These are the reasonings of the circuit court of appeals.

From the views expressed by Judge Gilbert we respectfully dissent, but, as we have already, we think, replied to them by our general argument, we shall not examine them anew so far as concerns the question whether the mortgage was by the certificates cut off entirely. As to whether it was cut off at least in part, whether it must bear some share of the loan made by the court, we will, however, examine the opin-

ion to point out what we respectfully deem are very clear mistakes of the record.

What we want to charge against the Meyer Lewis' mortgage, says Judge Gilbert, (p. 31) is the insurance and taxes paid upon it by the receiver. No, that is not all, we pray that the interest paid him be also charged (p. 10). Saying nothing about the interest his Honor reasons about the insurance and taxes. These, he continues, have evidently been incurred "on account of improvements placed upon the property by the railway company and not for taxes paid" upon the original lots. Why did his Honor assume this? But he goes on. We have lost nothing by paying him the taxes, since, if we had not paid him these, he could, after paying them himself, have charged the property with them and made us or it pay them back again. Very good, but how about the *insurance* which we paid? This he could not have paid, if we had not, and then have charged us or the property with it again, for there is no stipulation in his mortgage (p. 14) that would give him that right. It will not be contended that the mortgaged estate could be charged with insurance by the mortgagee (1 Jones, Mortgages § 414). If, therefore, the receiver had not paid that insurance, Meyer Lewis would have had to pay it himself *and would have lost it.* Has he not, then, profited by the protection of the court? Has he not increased its burden by his own benefits? But even if the insurance, the interest and the taxes paid by the receiver would all, if paid by Lewis himself, be a charge upon the mortgaged property so that the receiver's paying them was no gift to him, why should it be said that it was no benefit to him at all to have them advanced by us? Surely it was a benefit to him to have other people advance these sums for him even if he might, on paying them himself, make a lien of them. At all

events, it must not be assumed that to do so was no detriment to the receiver. The policy of a court might be entirely different as to advancing these sums, which undeniably protected the lien of Lewis' mortgage, if that lien could disavow them as not benefits received.

This case may well be illustrated by supposing that the receiver had put repairs upon the property or new improvements. The holder of a lien on the original property, fully aware of this, should apply to the court at once and make his objections to it. If he does not, but lets the improvements go on, and the estate gets into embarassment for official expenses, he should pay back what he has received by those improvements in which he has acquiesced. These doctrines do not depend upon the railway principles at all. In considering whether Meyer Lewis' lien should be at least *pro tanto* affected the question is one of equity in general.

Judge Hanford in the circuit and Judge Gilbert in the circuit court of appeals appear to us to have overlooked the obligation of Meyer Lewis to make any objections in the court which he suffered, during nearly a year, to conserve and protect his lien.

The certificates are simply receiver's expenses met in advance by a cash loan. Should the court, in the conservation of a property of any kind not belonging to a railway, say, a city building or a mill, incur official expenses, surely it will not be contended that underlying liens like that of Meyer Lewis here are not bound by them at all. If that can be contended under any circumstances, it will not be contended, we think, where part of those expenses have gone directly into the very property which that underlying lien particularly rests upon and seeks to segregate and withdraw, nay, more,

where the holder of that lien not only has notice of the court's course of action but personally assumes relations with it and makes no objection. It may not be necessary for your Honor to decide whether the holder of an underlying lien is bound by a receiver's expenses when he never even heard of the receivership. This is a stronger case.

For our own part, we think that those whose property or liens passes into the hands of a court through the insolvency of others are in the position of non-residents with property in a foreign jurisdiction. The citizen of London may grumble at the taxes of New York, but his property gets the protection of its laws. He may say he does not want that protection, but still he gets it. Perhaps it will be said that the cases are different. The citizen of London has deliberately invested in New York, so he is not like the owner of property that, without his knowledge and against his will, is dragged into a court, where he is not a party. Suppose, though, the case of personalty wrongfully carried from London to New York. Here the English citizen may follow and reclaim it, may refuse to pay taxes on personalty only temporarily in the state, and may withdraw it. But suppose he knowingly lets it remain in New York. Shall he not then bear taxation? This is Meyer Lewis' case here. The parallel is just and complete. He had his right, on the passing of that property into a receiver's hands, to inform the court by prompt petition that he could not continue the loan, and, when interest was offered him by the court, he should have refused it. As it is, he has played fast and loose. So long as the court could contrive to pay him he liked the relation. When that relation became burdensome, he disavows it altogether. The certificates he ignores, but it is indisputable that his own behavior has made them the more necessary. It is clear that if the court's administration of the

property had made a profit, Meyer Lewis kept himself in a way to enjoy that profit. Why should he not, then, respond to his share of its burdens? The receiver's possession of the property is not denied to have been lawful or, even as against the mortgagee, improper. Why is no part of the expenses a charge against that mortgage?

(*b*)

One thing is not adverted to at all by the lower court. Nowhere does that court say whether the order issuing these certificates as a first lien can be collaterally attacked by Meyer Lewis. Perhaps it will be said that he may so attack it because he was no party to that case at all. But may I collaterally attack, say, the appointment of a receiver because he was appointed when I was no party? His appointment may have been grossly irregular and I no party to the cause, but still, if he sues me, I cannot he heard to dispute that he is the receiver he claims he is.

Why should not Meyer Lewis be now relegated to the court that created the certificates, and, with his acquiescence, sold the property under them? Is it to be presumed that that court has not withheld from the proceeds of the sale sufficient to protect and discharge his lien?

The lower court argues that the purchasers of receiver's certificates buy at their peril. Certainly, no one would deny this. The purchasers at the sale, too, bought at their peril. But every equity that could have been invoked by the holders of the certificates can be invoked by the purchasers at the sale, not to mention the other equities they may invoke on account of Meyer Lewis' silence at that sale.

Again, it is to be observed that Meyer Lewis in his bill narrates the sale but does not seek to set it aside or disturb it. That

sale, however, was presumably for the benefit of all interested parties, so, the question recurs, why does he not go back to the court for his share of the proceeds of the sale, or be forced to show reasons here why that court could not or would not recognize his priority in distribution? It seems to us that he is willing to have that sale cut off everyone except himself. Is he not coming within the case of *Factors' and Traders' Insurance Company* vs. *Murphy* (111 U. S., 738). That was the instance of of an assignee's sale in bankruptcy free of all incumbrances as against an underlying mortgage which sought to ignore it.

"The defendent in error sued in the proper court of the State to foreclose a mortgage given by Paul Cook and Justus Vairin, Jr., to secure the payment of four notes of $10,000 each, given by them in their partnership name of Paul Cook & Co., of which she was then the holder and owner of two, all the notes being of the same date. She alleged that Cook & Vairin had been declared bankrupts, and that by certain proceedings in the bankruptcy court, and under its order, the mortgaged property had been sold free from incumbrance, and bought in by several persons who had liens on it, by whose order it was conveyed to the Factors' and Traders' Insurance Co., which held the other two notes secured by the mortgage. She further alleged that the effect of this sale was to extinguish the mortgage as to the notes held by that company, and all other liens but hers, and to make that company liable to her for the amount of these notes with a first lien on the property mortgaged. That the sale under the order in bankruptcy was not binding on her, because she was not made a party to the proceeding and had no notice of it, while it was binding on all the other lien holders whose liens were thereby discharged, leaving hers a paramount lien on the property."

The court first conceded that the lien of Mrs. Murphy,

the mortgagee foreclosing, was not cut off by the sale, since she was not a party to it. This, says the court, gave her the alternative right of taking her share of the proceeds of the sale and so ratifying it, or, which is what she did, proceeding to foreclose. In pursuing the latter, however, she so proceeded as to "affirm the sale as free of all incumbrances except her own," just as here Meyer Lewis' bill (p. 5) specifically gives us title except as against himself, and at all events does not deny that the sale was valid.

The court then held that sums expended by the purchasers for taxes and necessary repairs would take priority over her mortgage. These purchasers bought like the purchasers under the certificates here, at their peril, but still:

"In this view of the case it is not possble, consistently with any equitable view of the case, to hold that this sale discharged part of the liens against the property and increased thereby the value of the other liens at the expense of the purchasers."

This the court decided because the purchasers bought in the mistaken idea that they bought for her as well as for themselves. But, it will be objected, here none of the sums so expended were expended after the purchase. No, but they were expended for the benefit of Meyer Lewis's lien. Those who advanced money on the certificates, being bound by everything unfavorable in the record, may surely avail themselves of what is favorable. They are accordingly presumed, in taking a first lien on all the properties, to know that this part of those properties had gotten a share of those disbursements that made this loan necessary. The situation in the case first cited is simply the converse of this, not against it. The certificate holders advanced money, as they thought, for the benefit of

everybody in court, just as the purchasers in the *Factors' Insurance* case did for everybody for whom they erroneously believed they had purchased.

Let us in conclusion invoke the settled policy of courts as to good faith towards the holders of such certificates.

"Where such certificates are issued, and the court, as in this case, impresses upon them a preferential lien, good faith requires that its promise be redeemed, unless, perhaps, it be shown that the issue of the certificates was actually fraudulent."

Kneeland vs. *Luce*, 141 U. S. page 508.

The decree should be reversed and the demurrer to our answer overruled.

Respectfully submitted,

FREDERICK BAUSMAN,

Counsel for Appellant.

No. 212

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1898

THIRD STREET AND SUBURBAN RAILWAY COMPANY.
Appellant

vs.

MEYER LEWIS

Appeal from the United States Circuit Court of Appeals For the Ninth Circuit

APPELLANT'S REPLY

REPLY.

Our reply to the brief for Appellee need not be long.

It is sufficient to draw the Court's attention to the authorities cited on pages 8 to 11 of Appellee's brief in order to show how inapplicable they are. In the present case the question is how far a prior mortgage can be displaced by the debts of *the Court*. The authorities cited by Appellee, how-

ever, discuss only the power of the Court to displace such a mortgage by unsecured debts existing before the Court ever took the property in charge. Sometimes these debts, instead of being paid at once, are assumed by the Court and made preferential liens over the prior mortgage in the form of receiver's certificates. Through the judicial discussion of this sort of receiver's certificates learned counsel for Appellee appears to have been led into some confusion. Certificates imposed by the Court to pay or make preferential old debts of the Company stand in a very different light in equity from those imposed by the Court to pay debts of its own, debts incurred by the Court in its operation and preservation of the property, and in this instance operation, preservation and (through the acceptance of interest) the participation of the very person now complaining. When, therefore, the other side cite these expressions evidencing the delicacy of courts in displacing prior liens by receiver's certificates it should be borne in mind that the certificates referred to simply stand in place of old unsecured debts of the insolvent. But certificates issued purely for operating expenses, are for debts of the Court. Here they are acquiesced in by silence and relations with the Court. Indeed the whole controversy here is not so much about receiver's certificates as about a court's debts in managing an estate.

Respectfully submitted,

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No. 212.

Brf. of Blackburn & Hamilton

Appellee.

Supreme Court of the United States.

OCTOBER TERM, 1898.

Filed Jan. 23, 1899.

No. 212.

THIRD STREET AND SUBURBAN RAILWAY COMPANY, APPELLANT,

against

MEYER LEWIS.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS OF THE NINTH CIRCUIT.

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STATEMENT.

This cause comes here on an appeal from a decree of the United States circuit court of appeals for the ninth circuit, affirming an order of the circuit court for the district of Washington, northern division; which said order sustained the demurrer of the appellee to the amended answer of the appellants, and on which order a decree of foreclosure was entered. In his supplemental bill seeking foreclosure, the appellee sets up that on the 14th day of May, 1884, the West-

ern Mill Company, a corporation, made and delivered to the appellee its promissory note for twenty thousand dollars, payable three years after date, and to secure its payment executed a mortgage on certain lots in the city of Seattle; that the interest on said note and mortgage was paid to December 14, 1893, but not thereafter; that on October 14, 1891, the mortgagor sold and conveyed the property mortgaged to the Ranier Power and Railway Company, and that on or about the 13th day of June, 1893, in a cause pending in the circuit court of the United States for the district of Washington, brought by one A. P. Fuller, a receiver was appointed to take charge of the assets and affairs of said Ranier Power and Railway Company; that subsequently, on or about the 13th day of February, 1895, in the proceedings last mentioned and by order of the court, a deed for said mortgaged property was executed and delivered to parties who had purchased the same under a decree in said cause, and on the 12th day of February, 1895, the purchasers of said properties aforesaid conveyed the same to the Third Street and Suburban Railway Company, and that the interest of said Third Street and Suburban Railway Company was subject to the lien of the appellee's mortgage.

To this bill The Third Street and Suburban Railway Company, appellant, answered, alleging that the Ranier Power and Railway Company immediately, after receiving its conveyance of said lots from the mortgagor, applied said property to railway uses and erected thereon a power-house for its railway; that on June 13, 1893, a receiver was appointed to take charge of the assets and affairs of said railway company, and that said receiver, under order of the court, operated the railway properties and power-house, and on August 8, 1894, in pursuance of the instructions received from the court, issued receiver's certificates upon all of the property of said railway company, including the lands described in the bill; that it was adjudged by the court necessary and essential for the continued existence of the railway company,

as shown upon the receiver's petition, to issue these certificates, and that the order of the court made the certificates a first lien upon all of the property in the receiver's hands, including the mortgaged premises; that subsequently the certificate-holders, to enforce their lien, obtained an order for the sale of all the property in the receiver's hands, which sale was made on the 28th day of January, 1895; that upon the confirmation of this sale, on February 12, 1895, the purchasers of the property at such sale conveyed the same to the appellant, The Third Street and Suburban Railway Company. It is further alleged in the answer that the Ranier Power and Railway Company was a corporation organized with railway powers and owned public franchises for railway purposes; that the complainant did not seek to foreclose this mortgage at the time of the transfer of the land to the said corporation, but forebore to do so for more than two years, during which period the mortgage was overdue, but that he had accepted interest on the loan from said railway company, and also from the receiver; that the receiver before the announcement of the foreclosure suit paid taxes and insurance upon the land to the amount of about three thousand dollars; that although the complainant was not a party to the suit in which the receiver's certificates were issued, he had knowledge of that suit, and had accepted interest from the receiver with a knowledge of the litigation and of all of the facts set forth in the answer, and during the period of eleven months did not foreclose his mortgage and permitted the receiver with the trust funds to protect the mortgaged property. About three months before the issuance of the receiver's certificates, the complainant caused his appearance to be entered in said cause for the purpose of obtaining leave to sue the receiver, but did not ask to be made a party to the cause, nor did he serve notice of his appearance upon any of the parties; that he knew of the sale of the property under the receiver's certificates, but did not object or seek to disturb the same. To this answer a

demurrer was filed, which was sustained by the circuit court, and thereupon a decree of foreclosure was entered. From the order sustaining the demurrer an appeal was taken to the circuit court of appeals, which dismissed the appeal and affirmed the ruling of the court below. The decree of the circuit court of appeals is assigned as error on appeal to this court.

The particular grounds of error are specified in the appellant's brief on page 3, and in the discussion of these grounds two propositions are relied on: First, that the mortgage was wholly cut off by the certificates, and, second, that even if the mortgage was not cut off by the certificates, it yet must be charged with some of the expenses of the court. It is the contention of the appellee that neither of these propositions has any foundation in law. The positions now taken by the appellant and the arguments used in support thereof were taken and used in and before the circuit court of appeals, and they are fully considered and passed upon in the opinion of that court printed in the record and beginning on page 27.

ARGUMENT AND POINTS.

So fully have all of the material questions raised on the appeals from the order of the court sustaining the demurrer been discussed in the opinion of the circuit court of appeals that we might with propriety submit our case on that opinion, but to meet all possible objections we will very briefly discuss some of the more material points raised in the brief for appellant. The foundation of the contention of our adversaries is that the mortgage by the mill company to Meyer Lewis became by the subsequent sales of the property a railway mortgage, and, being thus converted into a railway mortgage, was subordinated to the lien of the certificates

under the decision of this court in the case of The Union Trust Company *vs.* The Railroad, 117 U. S., 434.

The primary error of the appellant is in assuming that the mortgage between individuals covering property in nowise connected with a railroad could by subsequent acts to which the mortgagee was not a party become a railway mortgage. When the appellee Lewis received his mortgage from the mill company, the rights and interests of Lewis became fixed, and no subsequent act on the part of the mill company could alter, vary, or lessen those rights. The after sale of the property to a railway company and the subjection of that property to railway uses could in nowise affect the interest of the appellee, and when the railway company went into the hands of the receiver the receiver, taking charge of the assets of the company, took only what the railroad had received from the mill company in the land in question.

It was not in the power of the mill company to disturb or to lessen the rights of the mortgagee; it was not in the power of that company to give to its grantee more than it possessed. The grantee really took in that property the right of the mill company to redeem, and when it became insolvent and went into the hands of the receiver, it only had in that property what it had obtained from the mill company, namely, its right to redeem, and when the receiver obtained from the circuit court authority to issue certificates and to make those certificates a first lien upon the property of the railway company, including the property purchased from the mill company, it obtained, so far as that property was concerned, the power only to make those certificates a first lien upon the right of the mill company to redeem that property from the mortgage of the appellee, and to that extent only could the court go, and its order making the certificates a first lien upon the property of the mill company must be read in that light.

But it is urged that the appellee had knowledge of this

order creating these certificates and of the sale of the property under that order, and that before such sale he had received interest from the receiver, and by the receipt of such interest had acquiesced in the transformation of this mortgage into a railroad mortgage. It is not contended in this connection that the appellee was ever, by any process of the court, made party to the suit wherein the receiver was appointed, or was ever brought by any decree or order of the court into a position where his rights and interests could be passed upon or bound by any decree in that suit.

The appellee's mortgage was a matter of record, and therefore notice to all of his first lien on the property. His rights were fixed and protected by law and could not be impaired—certainly not in a proceeding to which he was not a party. He had a right to assume that the action and proceedings of subsequent purchasers of the property were had and conducted with a full appreciation of his rights, and his knowledge of such proceedings carried with it no necessity for action on his part. He had a perfect right to receive from any number of subsequent holders by mesne conveyances the interest upon his mortgage, and the receipt of such interest did and could not, in the least degree, affect his lien. There was no obligation upon him to foreclose his mortgage immediately on the transfer of the property to the railway company; on the contrary, he had a right to forbear as long as the interest was paid, and it made not the slightest difference whether the interest was paid by the railway company or by the receivers.

As heretofore stated, the contention of the appellant is based upon the decision of this court in Trust Company *vs.* Railway Company, 117 U. S., 434; but in that case the court was dealing with railway mortgages, and the facts as to notice and other conditions of the case were entirely different from the case at bar, and these differences are very fully pointed out, and the inapplicability of the decision in that

case to the case at bar is very ably reasoned in the opinion of the circuit court of appeals (Record, p. 29).

There is absolutely nothing in this record showing the purposes for which the money realized from the sale of the certificates was used. In the Trust Company case a claim for $7,000—confessedly for the benefit of the trust—was disallowed, for the reason that "the purposes for which that sum was expended were not sufficiently shown."

The question of the priority of receiver's certificates and liens over existing mortgage liens has not very often been a matter of litigation, because in almost all instances in which the courts have authorized receivers to borrow money and make their obligation a first lien upon the property the mortgagees have themselves asked for the orders for this purpose in advance, or they expressly assented to the making of them, and, of course, they were in such cases precluded from afterwards claiming any priority over the lien thus created for the purpose of preserving the mortgaged property. But it is claimed that courts of equity have authority, without the consent of the mortgagees, to order the receivers to borrow money and to bind the property in their hands for the payment of liens. This authority, if it exists at all, is not, however, altogether discretionary; the judicial discretion is limited to settled principles of equity.

Jones on Railroad Securities, section 539.

The principle is clear that the mortgage cannot be displaced or postponed without the consent of the mortgagee. The court cannot by authorizing the receiver to create liens upon the property displace or impair the mortgagee's right of property any more than the legislature can impair the obligation of a contract. If such mortgagees are not parties to the suit in which the receiver was appointed they should be summoned in before the granting of any petition to charge the property with such debts. When prior mort-

gagees do not assent to receiver's liens these should be made expressly subject to the prior mortgages.

Jones on Railroad Securities, section 542.
Pennoyer *vs.* Neff, 95 U. S., 714.
Meyer *vs.* Johnson, 53 Ala., 237.

"The mortgagee has his strict rights which he may enforce in the ordinary way. If he asks no favors, he need grant none."

Fosdick *vs.* Schall, 99 U. S., 235.

And the power of courts to authorize receiver's certificates and to fix their status as to existing securities and the limitations upon that power are very fully discussed and stated in The Union Trust Company *vs.* The Midland Railroad Company, heretofore referred to.

See also Dunham *vs.* Railway Company, 1st Wallace, 254.
Fosdick *vs.* Schall, 99 U. S, 235.
Burnham *vs.* Bowen, 111 U. S., 780.

In the case of The T., D. & B. R. R. Co. *vs.* Hamilton, 134 U. S., 296, the question arose between a mortgagee and a party claiming a mechanic's lien upon the mortgaged premises as to the priority of payment. Mr. Justice Brewer, delivering the opinion of the court, says:

"It will be noticed, and it is a fact that lies at the foundation of this case, that the contracts for the construction of the docks were not made till more than three years after the execution and record of the mortgage. The record imparted notice to Hamilton, and all others, of the fact and terms of the mortgage; and the question is thus presented whether a railroad company, mortgagor, can, three years after creating by recorded mortgage an express lien upon its property, by contract with a third party displace the priority of the mortgage lien. It would seem that the question admits of but a single answer. Certainly as to ordi-

nary real estate, no one would have the hardihood to contend that it could be done. * * * By the mortgage the mortgagee took its vested priority beyond the power of the mortgagor or the legislature thereafter to disturb."

In Union Trust Co. *vs.* Morrison, 125 U. S., 591, the court say:

"In view of the discretion which the court of first instance is obliged to exercise in matters of that character taking all the circumstances into consideration, we cannot say that equitable relief was unduly extended in allowing the intervener's claim. * * * The ground of the claim is, that a portion of the property covered by the mortgage, being in peril of abstraction and loss, was rescued and saved to the mortgage by the act of the petitioner."

In Kneeland *vs.* American Loan and Trust Company, 136 U. S., 89, Mr. Justice Brewer, in speaking of the granting of preferences over the mortgage, says:

"The appointment of a receiver vests in the court no absolute control over the property and no general authority to displace vested contract liens. Because in a few specified and limited cases this court has declared that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a court appointing a receiver acquires power to give such preferences to any general and unsecured claims. It has been assumed that a court appointing a receiver could rightfully burden the mortgaged property for the payment of any unsecured indebtedness. Indeed, we are advised that some courts have made the appointment of a receiver conditional upon the payment of all unsecured indebtedness in preference to the mortgage liens sought to be enforced. Can anything be conceived which more thoroughly destroys the sacredness of contract obligations? One holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his vested and contracted priority as the holder of a mortgage on a farm or lot. So, when a court appoints a receiver of railroad property, it has no right to make that receivership conditional on the payment of other than those few unsecured claims which, by the rulings of

this court, have been declared to have an equitable priority. No one is bound to sell to a railroad company or to work for it, and whoever has dealings with a company whose property is mortgaged, must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of mortgage liens. It is the exception, and not the rule, that such priority of liens can be displaced. We emphasize this fact of the sacredness of contract liens, for the reason that there seems to be growing an idea that the chancellor, in the exercise of his equitable powers, has unlimited discretion in this matter of the displacement of vested liens."

In the case of Kneeland *vs.* Luce, 141 U. S., 508 (Appellant's Brief, p. 17), the consent of the trustees, and thus of the bondholders, was given to the issue of the receiver's certificates.

And in Wood *vs.* New York and New England Railroad Company, 70 Fed. Rep., 741, it is said that—

"The tendency of judicial decisions is to narrow rather than enlarge the class of claims against railroad companies to be preferred over mortgage liens out of funds in the hands of receivers."

The appellant's brief, in large part, is devoted to the discussion of the proposition that, even though the certificates are subordinate to the mortgage, the mortgage must bear some share of the court's expenses incurred by the receiver in payment of interest upon the mortgage and of taxes and repairs on the property mortgaged; in other words, that the holder of an ordinary mortgage on property subsequently conveyed to the purchaser, who afterwards became insolvent, but who before his insolvency had improved the property and paid interest upon the mortgage, is to be charged with the repayment of interest so paid and with the taxes and repairs on improvements made for the benefit of said subsequent purchaser.

It was held in Wood *vs.* Guarantee Trust Company, 128

U. S., 416, that the unsecured creditors of a water company were not entitled to any special priority, and that such priority would not be accorded except in the case of a railroad company.

It has also been decided that the doctrine of preferential debts has no application to a company which is a common carrier by water.

Bound *vs.* South Carolina R. R., 50 Fed. Rep., 312.

"Extensive as are the powers of courts of equity they do not authorize the chancellor to thus impair the force of solemn obligations and destroy vested rights. Instead of displacing mortgages and other vested liens upon the property of private corporations and natural persons it is the duty of courts to uphold and enforce them against all subsequent incumbrances. It would be dangerous to extend the power which has been recently exercised over railroad mortgages (sometimes with unwarranted freedom) on account of their peculiar nature, to all mortgages."

Farmers' L. & T. Co. *vs.* Grape Creek Coal Co., 50 Fed. Rep., 481.

If the order of sale makes no mention of prior liens or encumbrances of any kind, the sale passes the title to the property as it is in the receiver and subject to whatever encumbrances or liens there may be existing upon it. It has been held that the lien of a mortgage given by a firm to one who was not a party to the action subsequently brought, in which a receiver was appointed over its affairs, cannot be divested by a sale of the mortgaged property made by the receiver by authority of the court.

Lorch *vs.* Aultman, 75 Ind., 162.

The appellee forfeited no right by failure to foreclose his mortgage between the 14th day of December, 1893, to which date the interest was paid, and the 8th day of May, 1894, when he filed his petition in the circuit court of the United States asking leave to sue the receiver. A mortgagee who

fails to take action upon default in the payment of interest on the mortgage debt does not by such failure make the mortgagor his agent to incur debts, nor does he impliedly consent that debts incurred subsequent to the default shall take precedence over the mortgage debt.

Blair *vs.* St. L., H. & K. R. R., 22 Fed. Rep., 471.

There was no obligation upon the receiver to pay the interest or taxes upon this property, unless it was to preserve the property subject to the appellee's mortgage. The receiver could have defaulted in interest, and thereby compelled an earlier foreclosure. The receiver might have failed to pay taxes, and the unpaid taxes would have been a charge upon the property at the time of foreclosure, and if the receiver made repairs, it was to preserve not the rights of the mortgagee, but the contingent rights of the railway company and the receivership.

The mortgagor is not entitled to a credit on the mortgage debt for taxes paid by him.

Kilpatrick *vs.* Henson (Ala.), 1 So. Rep., 183.
Newton *vs.* Marshall, 62 Wis., 8.
Beltram *vs.* Villeré (La.), 4 So. Rep., 506.

This contention of the appellant is so fully disposed of by the opinion of the circuit court of appeals that we will dismiss the question with a quotation from that opinion. On page 31 the court says:

"The appellant insists that there is ground for the equitable preferment of the receiver's certificates over the complainant's liens in the fact that the receiver, before the commencement of this foreclosure suit, paid out of the assets of said railway company for insurance and taxes on the mortgaged property the sum of $3,000, thereby reducing the assets of the company and in part creating the necessity for the issuance of the certificates. We are unable to see how this contention can be sustained. If the receiver paid taxes and insurance, it was in the discharge of his duty and

in the course of business and for the purpose of protecting the property as it was, and, possibly, for the purpose of averting a suit by the complainant to foreclose his mortgage. The greater portion of the sum so paid is evidently on account of the improvements placed upon the property by the railway company and not for taxes upon the lots which were the subject of the complainant's mortgage. If the taxes had remained unpaid, they would now be an additional charge upon the real estate, and the complainant in his decree of foreclosure would be entitled to have that amount also paid out of the security. The mortgage contemplated this, and it is not shown that the value of the property is inadequate to meet such increased charge upon it."

It is respectfully submitted that the decree of the circuit court of appeals should be affirmed.

J. W. Blackburn, Jr.,
Geo. E. Hamilton,
Counsel for Appellee.

THIRD STREET AND SUBURBAN RAILWAY COMPANY *v.* LEWIS.

APPEAL FROM THE COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 212. Submitted March 10, 1899. — Decided March 20, 1899.

Under the act of August 13, 1888, c. 866, a Circuit Court of the United States has no jurisdiction, either original, or by removal from a state court, of a suit as one arising under the Constitution, laws or treaties, of the United States, unless that appears by the plaintiff's statement to be a necessary part of his claim.

If it does not appear at the outset that a suit is one of which the Circuit Court, at the time its jurisdiction is invoked, could properly take cognizance, the suit must be dismissed; and lack of jurisdiction cannot be supplied by anything set up by way of defence.

When jurisdiction originally depends upon diverse citizenship the decree of the Circuit Court of Appeals is final, though another ground of jurisdiction may be developed in the course of the proceedings.

THIS was a supplemental bill of complaint filed October 9, 1895, in the Circuit Court of the United States for the District of Washington. The original bill does not appear in the record, but the supplemental bill alleged —

"Meyer Lewis, a citizen of the city and county of San Francisco in the State of California, with leave of court first had and obtained, brings this, his supplemental bill, against the Third Street and Suburban Railway Company, a corporation duly organized and existing under the laws of the State of Washington, defendant, with its principal place of business in the city of Seattle, in said State; the original bill herein being brought by this plaintiff against Western Mill Company, a corporation organized and existing under the laws of the State of Washington, with its principal place of business in Seattle, in said State, John Leary and J. W. Edwards, citizens of Washington and residents of Seattle, James Oldfield, citizen of Washington and a resident of Seattle, Malcolm McDonald, a citizen of Washington and a resident of Fort Blakeley, in said State, the city of Seattle, a municipal corporation duly organized and existing under the laws of the

State of Washington, Washington Savings Bank, a corporation duly organized and existing under the laws of Washington, with its principal place of business in Seattle, in said State, and other defendants, against whom decrees *pro confesso* have been entered in the above-entitled cause prior to the bringing of this supplemental bill."

And set forth in paragraph one:

"That at all times hereinafter mentioned the defendant, Third Street and Suburban Railway Company, was and it now is a corporation, duly organized and existing under and by virtue of the laws of the State of Washington, with its principal place of business in the city of Seattle, in said State."

The supplemental bill then stated that the Western Mill Company, in May, 1884, and certain other defendants as sureties, made and delivered to plaintiff their note, to secure the payment of which, and the interest thereon and attorneys' fees, it executed a certain mortgage, which plaintiff sought by his bill to foreclose.

The eighth paragraph was as follows:

"That on or about the 14th day of October, 1891, the defendant, Western Mill Company, mortgagor herein, by its certain deed of sale, sold said mortgaged premises and every part thereof to the Ranier Power and Railway Company, a corporation organized under the laws of Washington, and having its principal place of business in Seattle; that thereafter, and on or about the 13th day of February, 1895, in the cause of *A. P. Fuller* v. *The Ranier Power & Railway Company*, No. —, then pending before this honorable court, Eben Smith, Esq., the duly appointed, qualified and acting master in chancery in said cause, made, executed and delivered to A. M. Brookes, Angus McIntosh and Frederick Bausman, purchasers of said premises, at a sale theretofore had, to satisfy a decree in said cause theretofore rendered by this court, a deed of sale to said mortgaged premises and each and every part thereof; that thereafter, on the 12th day of February, 1895, for a valuable consideration, said Angus McIntosh, A. M. Brookes and Frederick Bausman duly bargained and sold

by their deed of sale, their right, title and interest in and to said premises, and every part thereof to the Third Street and Suburban Railway Company, defendant herein, who now claims some interest in or lien upon said mortgaged premises through said deed of purchase, so made subsequent to the commencement of plaintiff's action, but that said interest in or lien upon said property is subsequent, subject and inferior to the lien of plaintiff's mortgage."

Thereupon plaintiff prayed judgment against the parties to the note for the sum alleged to be due with interest and attorneys' fees; that a decree for the sale of the mortgaged premises be entered, the proceeds to be applied in payment of the amount found due on the note and mortgage; that the railway company, and all persons claiming under it, be barred and foreclosed from setting up any claim or equity therein thereafter; and that plaintiff have judgment over for any deficiency on the sale. The defendant, the railway company, answered; a demurrer was sustained to its answer; and a decree was entered against the parties to the note for the amount due thereon and for the sale of the premises mortgaged, with judgment against them for any deficiency; and also for the distribution of any surplus that might remain after the application on the mortgage of the proceeds from the sale.

The case was carried on appeal to the Circuit Court of Appeals for the Ninth Circuit, and the decree below was by that court affirmed. 48 U. S. App. 273. And from its decree this appeal was allowed.

Mr. Frederick Bausman for appellant.

Mr. J. W. Blackburn, Jr., and *Mr. George E. Hamilton* for appellee.

Mr. Chief Justice Fuller, after stating the case, delivered the opinion of the court.

Although the record does not contain the original bill, it is apparent that the jurisdiction of the Circuit Court was invoked on the ground of diverse citizenship, and that the

interest of appellants in the mortgaged premises was acquired after the commencement of the action.

This supplemental bill made appellant a party defendant as claiming an interest, but the jurisdiction still rested on diversity of citizenship. The decree of the Circuit Court of Appeals was, therefore, made final by the statute, and the appeal cannot be sustained.

But it is said that because plaintiff saw fit to set forth the manner in which appellant obtained its interest, and it appeared that appellant claimed under a conveyance from the purchasers at a sale made pursuant to a decree of the Circuit Court, the jurisdiction was not entirely dependent on the citizenship of the parties. The averments, however, in respect to the acquisition of its interest by appellant, were no part of plaintiff's case, and if there had been no allegation of diverse citizenship the bill unquestionably could not have been retained. The mere reference to the sale and foreclosure could not have been laid hold of to maintain jurisdiction on the theory that plaintiff's cause of action was based on some right derived from the Constitution or laws of the United States.

It is thoroughly settled that under the act of August 13, 1888, c. 866, 25 Stat. 434, the Circuit Court of the United States has no jurisdiction, either original or by removal from a state court, of a suit as one arising under the Constitution, laws or treaties of the United States, unless that appears by the plaintiff's statement to be a necessary part of his claim. *Tennessee* v. *Union and Planters' Bank*, 152 U. S. 454; *Metcalf* v. *Watertown*, 128 U. S. 586, 589; *Colorado Central Mining Co.* v. *Turck*, 150 U. S. 138. If it does not appear at the outset that the suit is one of which the Circuit Court at the time its jurisdiction is invoked could properly take cognizance, the suit must be dismissed; and lack of jurisdiction cannot be supplied by anything set up by way of defence. And so when jurisdiction originally depends on diverse citizenship the decree of the Circuit Court of Appeals is final, though another ground of jurisdiction may be developed in the course of the proceedings. *Ex parte Jones*, 164 U. S. 691.

Appeal dismissed.